

1960

The State of Utah v. Leo Barrett Stewart, Jr. : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the

STATE OF UTAH

FILED

EG 2 - 1960

THE STATE OF UTAH,
Plaintiff and Respondent,

Clerk, Supreme Court, Utah

vs.

Case No. 9331

LEO BARRETT STEWART, JR.,
Defendant and Appellant,

BRIEF OF APPELLANT

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IN THE SUPREME COURT
of the
STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

LEO BARRETT STEWART, JR.,
Defendant and Appellant,

} Case No. 9331

BRIEF OF APPELLANT

STATEMENT OF FACT

The above entitled case came on for hearing on the 7th day of June, 1960, before the Honorable A. H. Ellett, Judge of the Third Judicial District Court, Salt Lake County, State of Utah. Defendant was charged in the information of the crime of negligent homicide in violation of Title 41, Chapter 6, Section 43.10, Utah Code Annotated, 1953, as enacted by the laws of Utah in 1955, and as amended by the laws of Utah in 1957, as follows, to wit: "That the said Leo Barrett Stewart, Jr. on or about the 9th day of March, 1959, in the County of Salt

Lake, State of Utah, being then and there a person operating a vehicle, to-wit, a 1956 GMC pickup truck, did then and there unlawfully and negligently drive said vehicle with reckless disregard for the safety of others, and did then and there inflict injury by the driving of said vehicle upon a person, to-wit, Paul Weddington, thereby proximately causing his death, which death ensued within one year of said injury.” (R. 8) The jury found defendant guilty as charged on June 7, 1960, and notice of appeal was filed on June 24, 1960.

Officer Norris K. Johnson of the Salt Lake City Police Department was called and testified for the State as follows: That he was one of the investigating officers; that on the 9th day of March, 1959, he was called to the scene of an accident at 21st South and 9th East Street, Salt Lake City, Utah; that he arrived at the scene of the accident at approximately 7:57 A.M. On his arrival he found a pickup truck and a passenger car had collided; that they were in approximately the position as shown on Exhibit P-1 and Exhibit P-7. The deceased, Paul Weddington, was the driver of the Plymouth automobile; defendant, Leo Barrett Stewart, Jr., was the driver of the truck. At the time of the accident Mr. Weddington was alone in the passenger car and defendant Stewart was the sole occupant of the pickup truck. The measurements as set forth on said

two Exhibits were made by Officer Norris K. Johnson.

Officer Johnson testified that he could find no skid marks from either vehicle (R. 36). Officer Johnson also identified the Exhibits P-2, 3, 4, 5 and 6, showing the vehicles involved in the accident, and also P-3 showing the intersection at 9th East and 21st South Street looking to the west, and Exhibit P-2, the same intersection, looking to the south. The photographs, Officers Johnson admitted, were taken four days after the accident and were introduced merely to show the general nature of the intersection itself (R. 38). Officer Johnson testified that the single semaphore at said intersection was working at the time he arrived at the scene of the accident. Officer Johnson testified that he found a Mr. Taylor, a witness to the accident; that in the presence of Officer Johnson and Mr. Taylor and defendant Stewart, Mr. Taylor stated that Mr. Stewart had run the red light; further, Officer Johnson testified that Mr. Stewart did not reply or say anything to said remark made by Mr. Taylor (R. 39). Officer Johnson also read the statement that Mr. Stewart gave to him at the time of the accident. "Mr. Stewart states, I was going west on 21st South. The last time I had looked at the light it was green; that was about 150 feet approximately before the intersection. I never even saw the other car

until I was in the intersection and then it was too late. I was in the middle lane at the time." (R. 40). He further stated that defendant Stewart told him that defendant Stewart was traveling at approximately 30 m.p.h. at the time of the accident (R. 40). That the distance of danger when Stewart realized there was going to be an accident was approximately 10 feet (R. 40). The light sequence for the semaphore for the lights facing to the east on 21st South was determined by Officer Johnson to be as follows: a five-second yellow light thirty-second red light and a thirty-five second green light (R. 41). Officer Johnson also testified that at the time of the accident, approximately 7:45 A.M., the sun was just above the mountains and shining westerly down 21st South (R. 41-42). Officer Johnson also testified that he had made investigation of other accidents at this intersection and that in his report in the investigation of this particular accident of Mr. Stewart's, he listed as one of the possible factors in this accident the sun obscuring the light in the semaphore (R. 42).

"Q. Isn't it a fact that in your report in your investigation of this accident you listed as one of the possible factors in this accident the sun obscuring the light semaphore?

"A. I stated that the sun was shining directly on the semaphore, it possibly might

have had an effect on the vision of the driver.”
(R. 42).

On cross-examination (R. 43) Officer Johnson was asked the following question:

“Q. Did you ever have any other conversations with Mr. Stewart when Mr. Taylor was present other than the one you just told us about?

“A. Not that I can remember.

“Q. Do you remember Mr. Stewart in that conversation and in the presence of Mr. Taylor making a statement to this effect: ‘That man ran the red light directly in front of me, or something to that effect?’

Objection to the question was made by the State and the court refused to allow the Officer to answer the question (R. 43-44). Further at R. 44 counsel for defendant on cross-examination, asked Officer Johnson:

“Q. One other question, Officer Johnson, this intersection — or Officer Johnson — excuse me — this intersection at 9th East and 21st South is one of the most dangerous intersections in the city, is it not?”

The court refused to allow Officer Johnson to answer that question (R. 44). Officer Johnson did testify that he had attended or investigated several accidents at this particular intersection (R. 44-45). Further he testified that there had been many accidents at this particular intersection (R. 45).

With reference to the position of the victim, Paul Weddington, as shown on Exhibits P-7 and P-1, there was uncertainty as to whether or not the position of the victim as shown on said exhibits was the actual position where the victim was after the accident. Police Officer Colbert of the Salt Lake City Police Department testified that it was customary prior to removing a victim, such as Mr. Weddington, to make a chalk mark around the body indicating the location where he was at the time. However, in this particular case that was not done.

Mr. Earl B. Taylor was called to testify on behalf of the State. Mr. Taylor testified (R. 52, 53): That on the morning of March 9, 1959, at approximately 7:45 A.M. he was traveling south on 9th East to his place of employment; that as he approached the intersection of 9th East and 21st South the light changed red before he reached it; that there was another car stopped ahead of him (R. 53). The car in front of him was the Weddington Plymouth automobile. He stated that they waited for a few moments and the light changed green and that immediately on the change of the light to green the Plymouth automobile in front of him started through the intersection (R. 54). Mr. Taylor testified that he had pulled forward a little ahead of where he had stopped and glanced to the east and saw this truck coming through the intersection.

That he stepped on his brakes and stopped his automobile in the cross-walk. That the truck came in through the intersection and struck the Plymouth automobile towards the middle section of the car (R. 54). At the time Mr. Taylor first saw the pick-up truck it was approximately two car lengths back of the intersection; that there were two cars in the left-turn lane going south or going west on 21st South (R. 54). Further, that the driver of the pick-up truck did not put on his brakes until just as he hit the Plymouth automobile (R. 55). Mr. Taylor testified that Mr. Stewart after the accident walked up towards him and stated: "I have often heard of these kind of things, but this is the first time I have been in one. That man ran right out in front of me." Mr. Taylor testified that he (Mr. Taylor) replied, "You were wrong, because you came through that red light." The defendant Stewart made no remark to that.

On cross-examination Mr. Taylor stated that the Weddington Plymouth car came to a complete stop at the intersection of 9th East and 21st South and that just the instant the light turned to green the Weddington Plymouth automobile started up fairly quick (R. 56). Mr. Taylor on cross-examination further testified that after his car had moved forward just a matter of a few feet he had no difficulty in seeing the pickup truck coming from the

left; that it didn't look like the pickup truck could make a good stop if he did stop (R. 57) and for that reason Mr. Taylor stopped his automobile. Mr. Taylor further testified that the light that would be facing the traffic coming from the east could not be seen directly by him but that he could see when the yellow light came on (R. 59).

It was stipulated and agreed in open court between the State and counsel for Defendant without the necessity of having the attending physician testify, that Paul Edward Weddington, the victim, died as a result of the accident; that the date of his death was March 12, 1959.

Joanne Monroe testified for the State as follows: That on the morning of March 9, 1959, at approximately 7:45 A.M. she was on her way to work at the Franklin School; she was proceeding west on 21st South (R. 63) that she approached the intersection of 21st South and 9th East; that she proceeded to the righthand lane behind another car preparatory to making a right hand turn from 21st South onto 9th East going north (R. 63). She testified that the car in front of her and she had come to a complete stop for the red light when she noticed another car coming down the lane to her left that wasn't stopping for the red light (R. 63). She testified that she had been stopped for approximately 3 or 4 seconds; that the other car approaching on

her left did not seem to be slowing down to stop for the red light (R. 63). That the car on her left, the pickup truck, proceeded into the intersection and hit the Weddington Plymouth automobile; that the Plymouth automobile was struck midsection by the pickup truck (R. 64). Mrs. Monroe testified that she had been driving for approximately 9 years and she estimated the speed of the pickup truck as 40 m.p.h. (R. 64) and that she did not notice any slowing down or change of speed as the pickup truck approached the intersection (R. 64). She further testified: "I didn't notice that I had any difficulty in seeing the light" (R. 64).

On cross-examination she stated:

"Q. Mrs. Monroe, were you the first car to stop at this intersection, or were you the second.

"A. There was a car in front of me. I was the second one.

"Q. I see, so whether or not you noticed the light you would have stopped anyway because of the car in front of you, wouldn't you?

"A. I am sure that's true, yes.

"Q. Do you think you were particularly paying attention to the semaphore at that time.

"A. I am quite certain I noticed it or I wouldn't have thought he is going to run the red light, which was my first thought.

Mrs. Monroe on cross-examination testified that she first noticed the pickup truck when it was right along side her and followed it until it reached the intersection (R. 65). That according to the measurements she actually saw the pickup truck for a distance of approximately 46 feet as it passed her on the left (R. 66). Even though she only saw the pickup for that distance, she still felt she was able to determine the speed of the automobile. The posted speed limit on 21st South going east and west was established in court as 30 m.p.h. (R. 66). Mrs. Monroe further testified that she did not know who the driver was of the car in front of her; that he must have made a right turn proceeding north on 9th East Street (R. 67).

Mr. Douglas Hubbard, witness for the State, testified that on the 9th of March, 1959, he was proceeding north on 9th East Street at approximately 7:45 A.M. on his way to work. That his wife accompanied him in the front seat of their car (R. 68). That he was in the lane of traffic nearest the center line (R. 69). Just before he arrived at the intersection the light turned yellow; he slowed down and came to a stop and waited until the light changed to red, that is, he waited through a yellow light and a red light (R. 69). That after the light turned green, he stated:

“Q. All right, now what happened after the light turned green?

A. After the light turned green — I am in the habit of looking at traffic, I don't trust the light, and as I looked to my right I saw this pickup truck and he seemed to be coming along at a fairly good speed and I didn't think he was going to stop, and I had crossed the lane about 3 feet approximately so I stopped and the truck went in front of me."

That the truck struck the gray Plymouth approximately in the midsection of the Plymouth. He testified that he first saw the truck when it was a few feet beyond the corner of Petty's Ford showroom, that is a little bit to the east of the west corner (R. 70). Mr. Hubbard testified that the truck was traveling close to 25 m.p.h. and as he approached the cross lane he stepped on it, the truck speeded up and at the point of impact was traveling in his opinion approximately 30 m.p.h., that is he had increased his speed 5 m.p.h. That he determined this from the sound of the motor and the actual movement of the vehicle (R. 70-71). That his vehicle was in the intersection no more than 3 feet at the time of the accident. On cross-examination Mr. Hubbard testified that he had used this route on his way to work on prior occasions, and that on prior occasions he had seen other cars run the red light both at 9th East and 7th. At that point the State raised an objection and the court refused to allow the witness to testify with respect to any

further violations of the semaphores (R. 72). Mr. Hubbard testified on cross-examination (R. 73) that it was apparent the pickup truck was going to proceed through the intersection and this was apparent to him when the truck was approximately 6 to 8 feet east of the east crosswalk. Mr. Hubbard also testified with respect to the Weddington car, (R. 73-76) :

“Q. Now, had he come to a complete stop at that intersection before he started (he is referring to the Weddington car).

“A. Yes, I happened to be watching as he came to the intersection, and the light was red for him and he slowed down more or less getting ready to put on his brakes, and he had stopped.

“Q. But you think he did stop.

“A. Oh, yes.

“Q. Do you remember having your deposition taken here several months ago, and didn't you in that deposition state that in your opinion the Weddington car or this gray Plymouth did not come to a complete stop?

“A. I don't remember for sure. That was over a year ago.

“Q. Well, your recollection a year ago would have been better than it is at the present time, wouldn't it, with respect to this accident?

“A. Oh, when I gave my deposition, I was positive of every fact I stated, yes.

"Q. I see. Did you have occasion to observe the driver of this gray Plymouth, particularly whether he looked to the right or the left in starting out into the intersection?

"A. Not to be sure, no.

"Q. Let me call your attention to the 25th day of September, 1959, at three fifty o'clock p.m. You had your deposition taken, did you not, before L. Reid Seely, a notary public, up in the Executive Building? Do you remember that?

"A. In the Insurance Building?

"Q. Well, maybe it was the Insurance Building. I thought it was the Executive Building.

"A. Could be.

"Q. Do you remember having your deposition taken at that time?

A. (Witness nods.)

"Q. Do you remember this question and the answer that you gave to it: Question, Now, where was Mr. Weddington's car when you first observed it?

Answer, 'I glanced at him. I saw him coming toward me slowly, on the other side of the street. He was just crawling. I think he saw the light was going to turn green, probably, and he just crept along to save putting on his brakes. I believe he did put them on before he hit there, but the light turned green before he came anywhere near the crosswalk.'

Question, 'What is your opinion as to

how far north of the north crosswalk Mr. Weddington's car was when the light changed green, facing you?"

Answer, 'Oh, making a rough stab, I'd say about fifteen or twenty feet.'

Question, 'And how fast was Mr. Weddington going at that time, in your opinion?'

Answer, 'In my opinion, he'd be close to a stall. He'd be going about ten to fifteen, ten to twelve miles an hour.' "

* * * *

"Q. Calling your attention to one other matter, Mr. Hubbard, with respect to your deposition taken on the above date, and as purely a matter to refresh your recollection with reference to this question I asked you about observing Mr. Weddington and whether or not he looked to the right or to the left, let me ask you if at that time in your deposition these were the questions and answers that were given at that time: Question, 'Did you observe which way he was looking before the accident happened? Did you observe Mr. Weddington at all in his car?'

Answer, 'Just looking straight ahead. I saw him just looking like that (indicating). He was driving.'

"Do you remember that question and your answer to it?

"A. I don't remember it now, but it must have been correct at that time."

Further, on cross-examination at R. 76 the following question was asked:

“Q. Now, also, Mr. Hubbard, isn’t it a fact that you were particularly cautious of this intersection because other cars prior to this time had been running the red light in front of you at this intersection?

A. No.

“Q. Let me call your attention to one other factor in your deposition and see if this doesn’t refresh your recollection to —

“MR. BLACK: Just a minute. I have already objected once to any evidence of prior incidents of other cars at this intersection. I believe it is immaterial.

“MR. McCULLOUGH: Your Honor, I didn’t bring it out for that purpose, and I made it specifically clear that I didn’t.

“THE COURT: I think you have no right to refresh his recollection unless he testifies now to something contrary to the way he testified before.

“MR. McCULLOUGH: Well, he did. That is what I am trying to bring out, Your Honor. I asked what was the reason for his being particularly cautious of this intersection. He says, ‘Well, just I don’t want somebody to hit me,’ or something of that nature. The thing I want to bring out is something entirely contrary to that.

“THE COURT: May I see what you are about to read to him?

(Judge looks at deposition.)

“THE COURT: The objection is sustained.

“MR. McCULLOUGH: May the record

show we would like to make a proffer of proof on that?"

The proffer of proof made out of the presence of the jury is found at page 80 of the Record, to-wit:

"MR. McCULLOUGH: Comes now the defendant and excepts to the ruling of the court with respect to the exclusion of the testimony solicited of the witness Douglas Hubbard in response to the question as to — what did he say?

"THE COURT: I know what he was going to say. He was going to say people had been running that red light in front of him for a long time, and that's why he was solicitous of his own welfare.

"MR. McCULLOUGH: Well, in response to the question of the counsel for the defendant to the effect that — or as to why he was particularly cautious at this intersection, defendant offers the following proffer of proof, and the witness would have testified as follows: 'I wasn't too much interested in him' — referring to the defendant — 'until the light turned red. Then I wondered who was going to run it this morning. That's the first thing I thought. I thought, 'Who's going to run the red light this morning?'

"And further, 'Well, the light turned green, and I got ready to move. And, of course, as I moved, just as I started, I looked. I thought, 'Well, who's coming?' And I saw this truck coming, and I mentioned to my wife, I said, 'Well, here goes another one. He can have the right-of-way as far as I'm concerned.'

“That’s all.

“THE COURT: That is the proffer that you tender, and do you want to hear it, or do you have objections?”

“MR. BLACK: What is that?”

“THE COURT: I say that is his proffer. Do you want the jury to hear it, or do you have objections to it?”

“MR. BLACK: I object to it for the same reason as stated before, that I think it is immaterial.

“THE COURT: The objection is sustained. And you have a motion you want to make.”

At the close of the State’s case defendant made a motion to dismiss on the grounds that the State failed to prove the commission of a crime and the motion of the defendant was denied. Whereupon, counsel for defendant made his opening statement. At this point the court instructed the reporter not to take down the opening statement made by Mr. McCullough. That opening statement becomes very material at this point because of the effect of the court’s ruling in refusing to allow Mr. James Challis, the City Traffic Engineer, to testify in behalf of the defendant. At pages (R. 81-83) court stated:

“THE COURT: I’m not sure I am going to let Mr. Challis testify to that effect, Mr. McCullough, because I have ruled heretofore that that is immaterial. Whether a lot

of other people have been negligent or whether a lot of other people have run stop signs is no concern of ours. Whether this defendant was negligent is a concern of ours; if he is negligent, whether it is of such a grave nature as to constitute recklessness so as to bring him within this charge; and I don't believe that this jury or I would be interested in knowing that on other occasions other people have done the same thing. I think I would not take our time on that.

"MR. McCULLOUGH: Well, I think the testimony that he can give with reference to this intersection and subsequent changes that have taken place are material and go to the very issue that we are trying to decide, this question of recklessness.

"THE COURT: Well, I'm not going to let him tell about how many people have violated the law or whether or not they have violated the law. I don't think that helps us a bit. If there is anything peculiar about this intersection or its timing that would help the jury in determining whether this defendant violated the law, then, of course, it would be material; but just for us to get out and try to determine whether other people were violating the law or not won't help us here. It seems to me it is something like when a man is charged with negligently shooting a deer hunter, and he could show every year so many deer hunters get shot every year. We are not interested in that case. We are interested in what happened in this case, and I will limit you to this case.

"MR. McCULLOUGH: Of course, I don't want to dispute the matter with Your

Honor since you have the last word anyway.

“THE COURT: Well, I do temporarily.

“MR. McCULLOUGH: But if you are going to limit it to that extent, the only issue is if the light was red, the light was red when he ran it, then he is guilty period.

“THE COURT: No, that is not quite. My instructions will show that is not true. There has got to be an element of recklessness in here before this defendant is guilty.

“MR. McCULLOUGH: Well, we will proceed then, Your Honor. If that is going to be Your Honor’s ruling —

“THE COURT: Yes.

“MR. McCULLOUGH: — of course, we would like —

“THE COURT: I am going to rule that this jury has no interest in whether other people have run lights because if we get that before us, we have got to go into every case to find out whether somebody else was negligent, and that is not — well, it seems to me we would be here a month, and I had better stop it before we get started.

“MR. McCULLOUGH: I would like the record to show I would like to make a proffer of proof, Your Honor.

“THE COURT: You may do that later.”

The proffer of proof submitted by the defendant is contained at page R. 91 of the record:

"MR. McCULLOUGH: Comes now the defendant and offers the following proffer of proof: That if the defendant's witness, Mr. James W. Challis, city traffic engineer, were allowed to testify, he would have testified as follows: That the intersection at 21st South and Ninth East for the year 1959 had the second highest number of accidents per number of cars traveling through the intersection of any intersection in Salt Lake City; that for a number of years prior thereto and at least five that this intersection has been one of the ten intersections having the highest accident ratio in Salt Lake City; that as a result of this accident ratio and studies with regard to the intersection itself, the city installed in place of the single semaphore in the center of the street a system of double semaphores, that is, two semaphores for each lane of traffic approaching the intersection and that the semaphore that was installed at the time of the accident was originally installed in 1935 and that since 1935 the lenses used in these semaphores have been corrected and perfected to eliminate the question of sun phantom, that is, the inability of the drivers to distinguish the red, yellow, and green signal when the sun is shining directly into them; that this semaphore had never been changed in any way since 1935 and still contained the original lenses; that at the time of the installation of the double system of semaphores in December of 1959 an all-red phase signal was installed, that is, that all semaphores for traffic approaching in any of the four directions are red at the same time and maintain a red signal for a definite length of time; that these factors were found

necessary to correct certain deficiencies existing at said intersection, said deficiencies having been determined to exist by reason of the prior accident rate and studies carried on in the office of the traffic engineer of Salt Lake City, Mr. James Challis; further that Mr. James Challis would testify with reference to the number of accidents which occurred at this intersection in the year 1959, the total of 24 in all, to show their relationship to the present or to the case at bar and the similarity that existed between them, all of which were factors which led the traffic engineer's office to recommend and install the new double system of semaphores and new all-red phase cycle at the intersection of 21st South and Ninth East. Judge, you should have let it in.

“THE COURT: Don't take this, Mirm.”

(Discussion off the record)

The record does not disclose the court's ruling with reference to this proffer of proof. However, the proffer of proof was refused by the court, and Mr. James Challis, city traffic engineer, was not allowed to testify to the matters set forth in the proffer.

Defendant Leo Barrett Stewart, Jr. testified in his own behalf that on the 9th day of March, 1959, at approximately 7:30 A.M. in the morning (R. 83) he was proceeding on his way west on 21st South to his employment (R. 84). Defendant Stewart testified as follows:

“Q. Will you tell us what happened.

“A. I left home at about seven fifteen in the morning. I live above the Wasatch Boulevard. I drove down to the boulevard and on over to Parleys Way to a semaphore light there down at 21st South, a semaphore light at 21st East and another one down at 17th East, another at 13th East, another at 11th East; proceeded on down the street and came to the Ninth East intersection. As I approached it, the light was green, and the traffic was stopped both sides of the road, at least there was none — that was stopped on the south. The north, I’m not sure whether they were at the road or not, but there was no traffic moving across the intersection. A car proceeded ahead of me going west, and I just normally proceeded down the street, and just as I got into the intersection a car come out in front of me, and I hit it broadside.

“Q. Now, approximately how far back from this intersection were you — can you people hear him? If you can’t raise your hand, and we will have him speak a little louder. Approximately how far back from the intersection were you, Leo, when you first saw the light was green or was apparent that it was green?

“A. Oh, it was green as I approached from quite a little distance back, possibly a half block back up the street.

“Q. Well, when was the last time you saw it?

“A. The last time I saw it was just before I got up to the intersection and entered

the intersection. There comes a time when it is no longer a problem of the light. There wasn't time for it to go through a yellow cycle and into a red cycle and plenty of time to go across the intersection, and I went ahead.

"Q. Were there any other cars coming from the south into the intersection?

"A. There was one car at the intersection, and there was another car approaching back behind that. In fact, I think there were three cars. I'm not sure, but some of the cars for some reason or other drew my attention to that side. I don't know whether it was movement of a car or what drew my attention to the side, and I looked to the left and swung my eyes back to the right. There was a car in front of me. I tried to stop and couldn't."

Mr. Stewart further testified that after the impact he went around the other side of the Plymouth automobile; that Mr. Weddington was just outside of his automobile not more than two feet (R. 85) from it (R. 86). That he immediately called the service station attendant and then went to a telephone booth to call an ambulance. Mr. Stewart testified that prior to the entering of the intersection he was traveling approximately 25 m.p.h.; that he had been coming through the various semaphores going west on 21st South; that he did not believe the semaphores he had come through were in a regular sequence (R. 86). Further, defendant Stewart testified (R. 86) :

"Q. As you approached this intersection of 21st East and — 21st South and Ninth East, will you tell me the position the sun was in at that time?

"A. The sun had just come up. It was at my back and had just come up.

"Q. And you are familiar with Parleys Canyon there, are you not?

"A. Yes sir.

"Q. Where was the sun in relation to Parley's Canyon?

"A. Well, at that time of the year the sun shines down through Parleys Canyon and lights down earlier, a little earlier than it does other parts of town, through Parleys Canyon and Millcreek Canyon the same way. The sun comes in quite a lot earlier.

"Q. Does that shine down 21st South?

"A. Yes."

Defendant Stewart further testified that as he came into the intersection he did not accelerate his vehicle to his knowledge except that possibly when he went to stop his foot may have slipped off the brake and hit the throttle; that this would have occurred only at the point of impact and not prior to the point of impact (R. 87). Defendant Stewart testified at R. 87 and 88:

"A. No sir. There was no reason to accelerate. I don't speed up at intersections. It is a normal habit to slow down.

“Q. Was there anything to call your attention to the fact that you did not have the right-of-way through this intersection that you could think of?

“A. Not a thing. It was a complete surprise to me when the car shot up in front of me. I proceeded because I thought the intersection, the right-of-way was mine. I was going on down the street.”

On cross-examination Defendant Stewart testified (R. 88) that he had taken this route on two or three occasions prior to this; that he was aware of the semaphore at the intersection of 9th East and 21st South and that there was a substantial amount of traffic going in all directions. He further testified that he had a definite recollection of the light being green at a distance of approximately 150 feet back from the intersection or at the approximate location in front of Petty Motor (R. 88):

“Q. Now, you have mentioned in your direct examination the figure of 150 feet back from the intersection. I take it that by that you are testifying that back here 150 feet, say probably somewhere in front of Petty Motor, you have a definite recollection of seeing the light green at that point. Is that right?

“A. Well, I have no reason to make 150-foot estimate, but — I think it might be wrong, but the light was green as I came up to it, yes sir.

“Q. Well, you did make that estimate

right after the accident when the officer talked to you, didn't you?

"A. Yes. I'm not sure whether it was suggested or whether I just — came out of blue sky or what, because there was no reason to make any actual footage. You can't estimate distance that close. I was thinking of the position that you are normally in when you approach an intersection. There comes a time when the light is in the center of the street when you can no longer readily see them. I don't know whether that is 100 feet, 150 or 70 feet, or some other distance."

Defendant Stewart testified that he did not believe the light turned yellow while it was still within his vision (R. 89). Further on cross-examination Defendant Stewart testified that there were two cars on his right, one going around the corner making a righthand turn, and the other he assumed to be making a righthand turn because it was following the other car. That in his opinion the cars on his right had not stopped (R. 90). Defendant Stewart testified at R. 90:

"Q. It is your testimony that you never did see a yellow light let alone a red light?

A. The yellow light didn't come on at that time. If it did, I was fooled somehow, because to my knowledge the light was green up until the time —

"Q. At the time you saw the light was green, you had no trouble at that time telling it was green, did you?

"A. No sir."

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN REFUSING TO ALLOW THE CITY ENGINEER, JAMES CHALLIS, TO TESTIFY WITH RESPECT TO THE STUDIES AND INVESTIGATIONS AT THE PARTICULAR INTERSECTION IN QUESTION TO SHOW THE DEFECTIVE CONDITION OF THE SEMAPHORE.

POINT II.

THE COURT ERRED IN THE ADMISSION OF EVIDENCE.

ARGUMENT

POINT I.

THE COURT ERRED IN REFUSING TO ALLOW THE CITY ENGINEER, JAMES CHALLIS, TO TESTIFY WITH RESPECT TO THE STUDIES AND INVESTIGATIONS AT THE PARTICULAR INTERSECTION IN QUESTION TO SHOW THE DEFECTIVE CONDITION OF THE SEMAPHORE.

The proffer of proof with respect to the proposed testimony of the City Engineer, James Challis, is set forth in full in the Statement of Fact and is therefore not repeated here. It is defendant's contention that the refusal of the lower court to allow the city engineer to testify as stated in the proffer of proof was prejudicial error and the verdict of the jury should be set aside.

Evidence of the defective condition of the light semaphore, i.e., so called "sun phantom", was proffered by defendant to show that if defendant did attempt to pass through a red light on the sema-

phore there was not present the inattention, or reckless disregard for the safety of others necessary to complete the crime of negligent homicide.

In the case of *Sinclair v. U. S.*, 265 F 991, 49 App DC 351, at page 992, Federal Reports, the court states:

“We do not believe that there was any fault on the part of the court in declining to permit a witness to testify that he had observed other accidents at the place where this accident occurred, and that he had one there himself. Those accidents may all have been the result of carelessness, and, if so, the fact that they took place would have no tendency to prove that defendant was not negligent. He was, however, permitted through a witness to describe the condition of the street at that point, and to say that there was ‘a right mean turn’ there. This was proper as bearing upon the question as to whether or not that condition of careless driving of the defendant was the cause of the accident.”

Evidence of similar accidents at this intersection to show a defective condition in operating equipment is admissible.

Officer Johnson recognized the factor of “sun phantom”.

Defendant Stewart testified with respect to the position of the sun, i.e., shining directly into the semaphore; and that perhaps he was misled by the light.

In the case of *Parker v. Bamberger*, et al, 100 Utah 361, 116 P 2d 425 (1941), it was alleged that the accident was caused by the failure of the railroad to keep a wig-wag signal in proper repair so that it would give reasonable warning of the presence of trains upon the tracks in the immediate vicinity of the crossing. The court stated at page 369 of Utah Reports:

“With respect to the second alleged act of negligence the trial court, over objection of appellant’s counsel, permitted evidence to be introduced as to various failures of the wig-wag signal to operate on occasions prior to the accident. Certainly such evidence was immaterial to show a defective signal device, as well as to show the probability of the company having notice of such defect. Appellants themselves introduced evidence to show that the device was not defective and that it was kept in proper repair thus creating a conflict in the evidence on this point. But evidence of failures of the wig-wag to operate in the past was material to show such a defective condition of the signal as might explain its operation on occasions testified to by appellants’ witnesses, and failure to operate on the occasions testified to by respondent’s witnesses. Under the allegations of the complaint and the issues in the case, all such testimony with respect to the wig-wag signal tending to establish that it was defective and failed to operate at the time of the accident and that the company knew or should have known of such defective condition was properly admissible. *Sargent v. Union Fuel Co.*, 37 Utah 392,

108 P 928." See also 46 ALR 2d 936 for similar cases.

In the reverse situation it has frequently been held that evidence of the absence of previous similar accidents at the same place where a plaintiff is injured in person or property is relevant and competent as tending to show that the conditions complained of were not so unreasonably dangerous as to render a defendant liable for failing to correct them.

The case of *Stocker v. Ogden City, McFarland v. Ogden City*, 88 Utah 389, 54 P 2d 849 (1936) was an action against the city for death of a resident from typhoid fever allegedly caused by drinking impure city water. The owner and manager of a hotel, which took water from a creek at a point where the water was alleged to be contaminated and which was near the city's intake, and the city health commissioner were competent to testify to the absence of sickness among patrons of the hotel who had drunk the allegedly contaminated water. The court stated at page 402 of the Utah Reports as follows:

"The chief objection argued is that the fact of no sickness at Wheeler Creek 'could not be pertinent to any issue in that case,' that 'defendant might as well have called all the other residents of Ogden and shown that they did not get typhoid fever by drinking the Ogden water,' and therefore argue that the disease did not come from the water.

“As we have already indicated, the source of the disease is a question of fact, and from the nature of the case the proof of necessity must be wholly circumstantial. Direct and positive evidence was not available. It is proper to receive evidence of all circumstances which will tend to establish or to disprove the source of the disease * * *” See also 31 ALR 2d 198 for cases in accord.

See also *Shugren v. Salt Lake City*, 48 U 320, 159 P 530 (1916) where it was held that evidence that other persons had previously stumbled, though had not fallen, over the projection in a sidewalk, on which plaintiff had tripped, causing her to fall is competent both as notice to the city, and as characterizing the defect. The court states at page 329 of Utah Reports:

“Counsel for defendant also insist that the court erred in permitting plaintiff’s witness to testify that they saw others persons in passing over the projection trip, before the plaintiff was tripped and fell. In that connection counsel contend that if the evidence had shown that others had tripped and fallen, then the evidence would have been competent, since it would then have constituted notice to the defendant that the defect was such as might cause injury; but they contend, merely to show that others in passing over the projection stumbled and tripped has no significance for the reason that it is a daily occurrence for pedestrians to stumble or trip over very slight defects. We think the evidence was proper. Counsel’s argument merely relates to the

weight and not to the competency of the evidence. We think the evidence proper both as to notice to the defendant and also as characterizing the defect * * *” See also 65 ALR 383 for other cases in accord.

See 20 Am Jur — Evidence — par. 304, page 282 — “Other Accidents and Injuries”:

“It is recognized in numerous cases that for certain purposes at least, evidence of other similar accidents or injuries at or near the same place or by the use of the same appliance suffered by persons other than the plaintiff and at other and different times, not too remote in point of time from the particular occurrence, is admissible. Evidence of prior accidents, when admissible, is generally admissible for the following purposes only: (1) To show the existence of a defective or dangerous condition or appliance and the dangerous character of the place of injury or of the machine or the appliance, and (2) to show the defendants notice or knowledge thereof.”

See 20 Am Jur — Evidence — par. 247, page 240, for a definition of relevancy:

“Generally, it may be said that any legally competent evidence which, when taken alone or in connection with other evidence, affords reasonable inferences upon the matter in issue, tends to prove or disprove a material or controlling issue or to defeat the rights asserted by one or the other parties, and sheds any light upon or touches the issues in such a way as to enable the jury to draw a logical inference with respect to the principal fact in issue is relevant and admissible.”

In Wigmore on Evidence, Vol. 1, 3rd Ed., par.

9 I:

“None but facts having rational probative value are admissible. This principle is indeed axiomatic, for any system of evidence purporting to be rational. It assumes no particular doctrine as to the kind of ratiocination implied, — whether practical or scientific, coarse and ready, or refined and systematic. It prescribes merely that whatever is presented as evidence shall be presented on the hypothesis that it is calculated according to the prevailing standards of reasoning, to effect rational persuasion.”

See *Remy v. Olds*, 4 Cal, unreported, 240, 34 P 216, 21 LRA 645, where one of the grounds urged for reversing the judgment was the action of the trial court in striking certain testimony as being entirely collateral and having “no bearing on the case.” The reviewing court in discussing the question thus raised stated at page 246 of 4 Cal unreported at page 218 of 34 Pac.:

“That the evidence was upon a collateral issue is not conclusive whether the fact it tended to establish would tend to prove or disprove the fact at issue. Evidence is relevant not only when it tends to prove or disprove the precise fact in issue, but when it tends to establish a fact which the existence or non-existence of the fact in issue can be directly inferred.”

POINT II.

THE COURT ERRED IN THE ADMISSION OF EVIDENCE.

A. Officer Johnson testified that he found a Mr. Taylor, a witness to the accident; that in the presence of Officer Johnson and Mr. Taylor and Defendant Stewart, Mr. Taylor stated that "Mr. Stewart had run the red light;" further Officer Johnson testified that Mr. Stewart did not reply or say anything to said remark made by Mr. Taylor. (R. 39)

On cross examination (R. 43) Officer Johnson was asked the following question:

"Q. Did you ever have any other conversations with Mr. Stewart when Mr. Taylor was present other than the one you just told us about?

"A. Not that I can remember.

"Q. Do you remember Mr. Stewart, in that conversation and in the presence of Mr. Taylor, making a statement to this effect:

"That man ran the red light directly in front of me, or something to that effect?" "

Objection was made by the state and the court refused to allow him to answer.

Even Mr. Taylor admitted hearing Mr. Stewart make such a statement (R. 55). For the court to refuse to allow defendant to cross-examine Officer Johnson was an unexplained silence on the part of

defendant which could only be interpreted by the jury as an admission by defendant, when such was not the truth. Certainly defendant has the right to impeach the witness if possible and to lay a foundation for such impeachment.

B. On cross-examination Officer Johnson was asked:

“Q. One other question, Officer Johnson, * * * this intersection at 9th East and 21st South is one of the most dangerous intersections in the city, is it not?”

The court refused to allow Officer Johnson to answer that question (R. 44).

Argument with respect to this point is adequately set forth in Point I and is therefore not repeated here.

C. On cross-examination of Mr. Hubbard, the State's witness, the following question was asked (R. 76):

“Q. Now, also, Mr. Hubbard, isn't it a fact that you were particularly cautious of this intersection because other cars prior to this time had been running the light in front of you at the intersection?”

“A. No.

“Q. Let me call your attention to one other factor in your deposition and see if this doesn't refresh your recollection to * * *”

At this point the state objected and the court

refused to allow defendant to impeach the witness, by the use of a deposition taken in another case, wherein he had testified to the contrary. (See proffer of proof (R. 80). That defendant has a right to impeach the state's witness by referring to prior statements is fundamental.

Further, Witness Hubbard's testimony in the proffer of proof when considered with the excluded testimony of the City Engineer, James Challis, is explained and clearly admissible. See Point I for argument — also 20 Am Jur (Evidence) par. 251, page 245.

CONCLUSION

The judgment of the lower court should be reversed.

Respectfully submitted,

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