1964

The State of Utah v. Robert Delaney : Brief of Respondent

Utah Supreme Court

J. Harlan Burns; Attorney for the Appellant-Defendant;
A. Pratt Kesler; Ronald N. Boyce; Attorneys for Plaintiff-Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

— vs. —

ROBERT DELANEY,
Defendant-Appellant.

Case
No. 10073

BRIEF OF RESPONDENT

Appeal From the Judgment of the
Fifth District Court for Utah County
Hon. C. Nelson Day, *Judge*

A. PRATT KESLER
Attorney General
RONALD N. BOYCE
Chief Assistant Attorney General
State Capitol
Salt Lake City, Utah
Attorneys for Respondent

J. HARLAN BURNS
95 North Main
Cedar City, Utah
Attorney for Appellant

TABLE OF CONTENTS

Authorities Cited

TABLE OF CONTENTS — (Continued)

Cases Cited

Statutes Cited

Texts Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff-Respondent,

— vs. —

ROBERT DELANEY,
Defendant-Appellant.

Case No. 10073

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF CASE

The appellant, Robert Delaney, has appealed from his conviction upon jury trial of the crime of negligent homicide, 41-6-43.10, Utah Code Annotated 1953, in the Fifth Judicial District Court in and for Iron County, the Honorable C. Nelson Day, Judge, presiding.

DISPOSITION IN LOWER COURT

After full jury trial on the information, the appellant was convicted of the misdemeanor of negligent homicide and sentenced to 60 days confinement in the Iron County Jail.

RELIEF SOUGHT ON APPEAL

The respondent submits that the points urged by the appellant do not warrant any other action by this court than affirmance.

STATEMENT OF FACTS

The respondent agrees with some of the facts set forth in appellant's brief, but submits the following statement of facts as being more in keeping with the rule on appeal that the evidence will be viewed in a light most favorable to the jury's verdict.

Shortly after midnight, in the early morning of March 2nd, 1963, the defendant drove himself, Christine Lambert, Michael J. Higbee and Diana Miller up Cedar Canyon on Highway 14 in Iron County (T. 5, 8, 146). Christine Lambert was 17 years old at the time and appellant was 19 (T. 471). Prior to the journey up the canyon, the appellant had consumed four cans of beer (T. 473-475) and possibly more (T. 338). Appellant had been at a social gathering where beer and hard liquor were available (T. 510). Although appellant did not remember, he had danced while at the gathering (T. 510).

As the journey up Cedar Canyon started, appellant was driving, Christine Lambert was sitting in the front seat of the car next to appellant, and Mr. Higbee and Miss Miller were sitting in the rear of the vehicle (T. 151). Mr. Higbee had some beer in the car at the time they left (T. 152, 382, 516).

As they started out, appellant accelerated at a very fast rate of speed and although appellant denied running

a stop sign, Diana Miller testified that he failed to stop at a sign and at that time was going very fast, which frightened her (T. 372, 383). She testified that although she did not notice anything unusual as they drove up the canyon, she liked fast driving and would not be concerned at excessive speed (T. 386). During the trip up the canyon, the parties were talking and playing a record player in the car (T. 273-279, 377). The posted speed limit in the canyon is 50 miles per hour (T. 68), and friends of the appellant estimated his speed well in excess of 50 miles per hour. A. B. Hatch, who passed appellant's car as it came up the canyon, estimated the speed at 70 miles per hour (T. 317) as did Sylvia Gale (T. 325). Gary C. Mackelprang, who was in a vehicle following appellant, estimated appellant's speed as high as 70 miles per hour and indicated that he had some concern during the trip up the canyon (T. 329). Delaney himself estimated his speed as between 60 to 65 miles per hour (T. 484). The canyon road is a winding, curving, elevated road (T. 64, 94, 186).

At a point up the canyon, the Delaney vehicle overturned, resulting in the almost instant death of Christine Lambert (T. 6, 51, 52). The vehicle came to a rest on its top (T. 6). The highway patrol measured 707 feet of the radius of scuff and skid marks left by the appellant's vehicle before coming to rest (T. 67, 31-32). The vehicle traveled across the center lines into the embankment and back onto the road. From the measurement, the speed of the vehicle at the time of the accident (minimum speed) was estimated at 99.9 to 101 miles per hour

(T. 252, 253). The appellant indicated that he did not apply his brakes (T. 505) and further testified he had been talking to his rear-seat passenger at the time of the accident (T. 485).

Immediately after the accident, upon being questioned by Officer John R. Williams, appellant stated as to what happened, "I guess we were racing a little." (T. 6) Further the appellant consistently said with reference to the dead girl, "I killed, I killed her." (T. 7, 13, 288) Immediately after the accident, a car driven by Mel Clark, a friend of the appellant, arrived at the accident, skidding against a guard rail to stop (T. 431, 328-339).

The appellant's automobile was a 1961 Chevrolet two-door, designed as a racing vehicle, although it was a stock car capable of being purchased on the open market (T. 165, 166). The vehicle contained a 350 h.p. engine, four-speed transmission, and racing brakes (T. 165-166). The car had a heavy duty suspension which would normally allow it to take curves better (T. 166). In drag racing, with some mechanical changes, the appellant's car had been recorded to accelerate from a stop to 96 miles per hour[1] within a quarter of a mile (T. 167). It was estimated that the car was capable of speeds of 135 to 140 miles per hour (T. 168), and the appellant admitted that the car could probably do 120 miles per hour without being fixed up in prime racing shape (T. 492).

---

[1] 99 miles per hour at one time (T. 167).

Based upon the above evidence, characterized most favorably to the verdict, the jury convicted the appellant of the crime charged. Other facts relevant to the specific issues raised on appeal are set out under the points in argument. The respondent agrees with the appellant that the trial, covering some four days, must be approached as to factual sufficiency from a view of the whole record covering some 534 pages of transcript. When so viewed, it is submitted that a fair verdict was returned and no basis for reversal exists.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT EVIDENCE ANY BIAS OR PREJUDICE BY ASKING QUESTIONS OF A PROSECUTION WITNESS WHICH WERE MERELY FOR CLARIFICATION AND AN AID AT ASCERTAINING THE TRUTH AND UNDERSTANDING THE EVIDENCE.

The appellant argues that the trial judge deprived the appellant of a fair trial by interrogating a witness for the state and thus evidencing a bias and prejudice toward the appellant. The conduct which the appellant claims prejudiced him occurred after all the state's evidence had been presented and after most of the independent evidence of the defense had been received. During the course of the state's evidence, Officer William Burch of the Highway Patrol was called as a witness (T. 22). He testified as to physical evidence at the accident scene (T. 27), the position of the appellant's vehicle (T. 27), and the course and path that the vehicle followed, which he said

could be clearly followed (T. 28). He testified as to measurements he made with respect to the vehicle's path (T. 31, 32, 34). A diagram of the path of the vehicle was made by Officer Burch on the courtroom blackboard (Exhibit D-1). Officer Burch's testimony, along with that of Guy D. Neilson of the State Highway Department (T. 177, etc.), provided a basis for a hypothetical question to an expert who placed the appellant's speed at 99.9 to 101 miles per hour, at the minimum, at the time of the accident (T. 252).

The appellant was agreeable to a view of the accident scene (T. 441, 443). The court admonished the jury *twice* that they were not to engage in any unauthorized communication (T. 445, 446). Thereafter, the sheriff, counsel, the accused and the jury went to the scene of the accident. Officer Burch was also present with the reporter (T. 447). The court asked Officer Burch to point out the landmarks and physical features to which he had previously testified in court. Not one of the questions in any way reflected any bias or prejudice on the part of the trial judge (T. 447-460). Appellant in no way points out any question or series of questions which could be said to evidence any bias or prejudice or be unfairly couched toward the prosecution. No objection, based on a claim of bias or prejudice of the trial court, was ever raised below. In addition, the appellant's counsel asked some questions of the witness (T. 453, 454, 456, 457, 458). The only action of the court during the course of the trial which the appellant complains indicates prejudice (Brief p. 16) was an admonition to the appellant not to volun-

teer where an answer he gave in response to a prosecution question was non-responsive (T. 491). This did not occur during the view and was proper where the witness was going afield. In contrast to the appellant's contention, the record shows the court attempted to protect the appellant from prejudice at one point in the trial by restricting the prosecution from going into a description of the gruesome scene at the accident, where it was repetitious (T. 39). In addition, the court sustained defense motions to strike (T. 180) and excluded the results of appellant's blood test, apparently because of a claimed failure of chain of custody. This ruling was extremely favorable to the appellant and was a very severe interpretation of the chain of custody requirements. *Nichols v. McCoy*, 38 Cal. 2d 447, 240 P. 2d 569; Wharton's *Criminal Evidence*, Vol. 2, p. 509, etc. (T. 207, etc.) These facts, when viewed against the whole record, and the accommodating sentence imposed (R. 40-43) clearly refute a claim that the trial judge was in any way biased or prejudiced, or that his questions to Officer Burch, which were for the purposes of clarifying the evidence (T. 456, Line 5), in any way unfairly treated the appellant. Additionally, after returning from the accident scene, the court *sua sponte* instructed the jury (T. 461):

> "THE COURT: The record should show that the defendant is present with his attorney and the Jury is in the box. I believe the record should show further that we have now returned to the Courtroom from our excursion up Cedar Canyon, or I guess it is Cedar Canyon, isn't it, Gentlemen? Anyway, the canyon east of Cedar, in any event, to view the scene of the accident with which

we are here concerned. Ladies and Gentlemen of the Jury, so there will be no misunderstanding, while we were at the scene of the accident for the purpose of providing you with a view of this accident scene, and not with any idea of intention of persuading your minds one way or the other by the Court and by that I mean the Judge, myself, attempted to with the assistance of Officer Burch to elicit information as to the points which are — some of them being indicated on the chalk outline on our blackboard there. I would want you to have no idea that the Court was in any manner attempting to influence your thinking or your view of the situation in any particular. What I would think about this case as to the facts is entirely immaterial. It is your decision and your decision alone which will govern as to the factual situation. I would want you to have no idea that I was attempting to either persuade you one way or the other, for or against the State or the defendant or in anywise by my questions or by my attempts to assist Officer Burch in pointing these items out to you. I want to make that very clear to you that in no way was I attempting to influence you at any point in our excursion up there, nor during the course of the trial, because you are the triers of the facts."

It should also be noted that no motion for mistrial was made at the time of the viewing, nor did the appellant's motion for new trial cite the present claim as a basis for new trial (R. 38).

The general rule as to the power and duty of the trial court to examine witnesses or call for evidence is stated in Abbott, *Criminal Trial Practice*, § 323:

> "The judge may in his discretion interpose of his own motion to call out legal evidence by

> interrogating a witness under examination, or to call a witness who should be called by the prosecution. But it is error in so doing to express opinions prejudicial to the accused or indicate to the jury his opinion as to the merits of the case of the credibility or weight of the evidence."

It is not a basis to complain that the trial court's examination is extended unless it becomes overbearing and assumes the role of an advocate. *Gordon* v. *Irvine,* 105 Ga. 144, 31 S.E. 151. The court has an obligation to see that the evidence is fully developed or is comprehendible by the jury. *People* v. *Rongetti,* 331 Ill. 581, 163 N.E. 373; *Wharton's Criminal Evidence,* § 842. Generally, "whether or not the court shall question a witness and the extent of its examination are within its sound discretion." *Wharton's Criminal Evidence,* § 842, p. 213.

In *State* v. *Gleason,* 86 Utah 26, 40 P. 2d 222 (1935), a similar objection was made to that raised in the instant case. The court noted:

> ". . . No objection is made that the questions asked by the court elicited testimony that was incompetent, irrelevant, or immaterial, or were otherwise improper if such questions had been asked by counsel for either side. The basis of the objection is that the trial judge ought not to have examined the witnesses at all, and that in asking the question the judge indicated an opinion with respect to the credibility of the witnesses examined, or, perhaps, as to the defendant's guilt, all to defendant's prejudice before the jury."

This court went on to find that no prejudice resulted from the judge's questions to several witnesses and stated:

> "The conduct of a trial is to a large extent under the control and within the discretion of the trial judge who should preside with dignity and impartiality. He is more than a mere referee or moderator. State v. Keehn, 85 Kan. 765, 118 P. 851. He should not express, or otherwise indicate, an opinion as to the credibility of the witness or the guilt of the defendant. Such matters are exclusively for the jury. The practice is well established for the trial judge, within reasonable bounds, to ask questions of any witness who may be on the stand for the purpose of eliciting the truth, or making clear any points that otherwise would remain obscure. 16 C. J. 831; People v. Reid, 72 Cal. App. 611, 237 P. 824. It is generally held that in the exercise of his right to question a witness, the judge should not indulge in extensive examination or usurp the function of counsel. In a criminal case he should not by form of question or manner or extent of examination indicate to the jury his opinion as to the guilt of the defendant or the weight or sufficiency of the evidence. Note 84 A.L.R. 1172; 28 R.C.L. 587. His examinations should not be extensive because it is a matter of much difficulty for any person to indulge in an extensive examination of the witness without indicating a train of thought or some feeling with respect to the truth or falsity of the testimony being elicited. His attitude should at all times be fair and impartial so that neither by tone of voice, facial expression, nor manner of propounding a question is bias shown which may prejudice the defendant's right to a fair and impartial trial. A trial judge is within his rights in asking questions for the purpose of eliciting the

> truth or to clear up an obscurity. People v. Jenkins, 118 Cal. App. 116, 4 P. (2d) 799. But in doing so, sincerity and fairness should characterize his every word and action."

The court determined that the questioning there, which is not far removed from that in the instant case, was not prejudicial.

A similar result was reached in *State* v. *Green*, 89 Utah 437, 57 P. 2d 750 (1936). See also *State* v. *Kallas*, 97 Utah 492, 94 P. 2d 414 (1939).

In *People* v. *Rigney*, 55 Cal. 2d 234, 10 Cal. Rep. 625, 359 P. 2d 23 (1961), the California Supreme Court recognized the general rules set out above by the Utah court and noted:

> "Although the judge questioned defendant and Doctor Brandmeyer at great length 'the mere fact that the judge examined * * * at some length does not establish misconduct.' People v. Corrigan, supra, 48 Cal. 2d 551, 559, 310 P. 2d 953, 958; People v. Montgomery, supra, 47 Cal. App. 2d 1, 18, 117 P. 2d 437."

In that case the court noted as to the facts:

> "In the present case the trial judge, over defendant's objection, examined him extensively as to events immediately preceding the shooting, interrupting the deputy district attorney's cross-examination to do so. The judge questioned defendant closely to clarify inconsistencies between his testimony on the stand and statements he had previously made. After defendant was excused as a witness and Doctor Brandmeyer was about to take the stand, the judge recalled defendant and once again questioned him as to his memory of the shooting. After defendant had been excused

> a second time and before Doctor Brandmeyer's examination began, the parties retired to chambers for a conference." [At which conference the judge told defense counsel he disbelieved his client, the accused.]

The California Supreme Court found no impropriety warranting reversal. It declared:

> "* * * A careful examination of the record convinces us that the judge's questions were not a guise for conveying to the jury the court's disbelief in defendant's evidence but were asked to get the truth established, and that they fairly and impartially brought out relevant and material testimony. Moreover, the judge instructed the jury that any intimation in his questions or the questions of counsel that certain facts were or were not true must be disregarded, and he adequately instructed them that they were the exclusive judges of the effect and value of the evidence."

In the instant case, the court did not transmit any indication of his beliefs to the jury. His questioning was directed towards clarifying and making understandable the testimony as to physical evidence offered by Officer Burch. This is a proper action. This limited participation by the court, coupled with his admonition against drawing inferences, obviously did not result in prejudice. Especially is this clear from a full reading of all that occurred during the long trial.

POINT II

THE TRIAL COURT DID NOT COMMIT ERROR IN THE MANNER OF CONDUCTING THE VIEW OF THE SCENE OF THE CRIME.

The appellant makes a scattergun attack to the effect that the court erred in the manner in which the view of the accident scene was conducted. The specific nature of the appellant's objection is not pinpointed, but generally it may be said that appellant contends that 77-31-26, Utah Code Annotated 1953, was violated. This section provides:

> "When in the opinion of the court it is proper that the jury should view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order the jury to be conducted in a body, in the custody of an officer, to the place, which must be shown to them by a person appointed by the court for that purpose; and the officer must be sworn to suffer no person to speak or communicate with the jury, nor do so himself, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time."

The statute is directory in nature. First, it leaves the matter of the view in the discretion of the trial judge. Secondly, it requires that a person be appointed to act as custodian of the jury. Third, the officer must be sworn against unauthorized communication. In the instant case the appellant consented to the view of the accident scene (T. 441, 443). No objection was raised in the trial court to the judge being present when the view occurred. No objection was or is made that the jury was not properly in the custody of the sheriff, indeed the custodian was in charge of the jury.

Nothing in 77-31-26, U.C.A. 1953, specifies that the judge may not accompany the jury. It would be a difficult situation if the judge could not view the accident scene but was still called on to appraise the evidence as against motions attacking its legal sufficiency. It is difficult to see in what manner this could in any way prejudice the accused. In *State* v. *Clow,* 215 Minn. 380, 10 N.W. 2d 359 (1943), the Minnesota Supreme Court indicated that not only was it proper for the trial court to allow the view, it was equally proper for him to point out to the jury objects at the locus in quo to better enable the jury to understand the testimony. Although the court reversed, it did so because of the failure to provide a reporter's transcript to show what actually occurred. In the instant appeal, all that occurred was a matter of record.

The appellant places reliance on *State* v. *Mortensen,* 26 Utah 312, 73 Pac. 562 (1903), for the proposition that the court erred in accompanying the jury. There is no merit to appellant's contention. That case considered only the question of the presence of the accused, and did not consider the presence of the judge. The court merely quoted from a Kansas case on the necessity of the accused's presence, which case had mentioned that under Kansas procedure, the judge remains in the courtroom. Further, since no objection to the judge being present was voiced, the *Mortensen* case would support a conclusion of waiver. Finally, no reasonable justification can be shown why the judge should not also view the scene, nor can any demonstration be made as to how that factor

could prejudice the accused. Specific prejudice must arise from the view. *State* v. *Shaw*, 59 Utah 536, 205 Pac. 339 (1922); 77-42-1, U.C.A. 1953. A number of cases have expressly ruled that an accused has the right to have the judge present at the viewing and that his absence may be error. Anno., 47 A.L.R. 2d 1227; 53 Am. Jur., *Trial*, § 446; Anno., 42 L.R.A. 381.

Secondly, the appellant seems to contend that the court erred in receiving evidence at the scene. Nothing in Section 77-31-26, U.C.A. 1953, prohibits the court from conducting a hearing at the scene in order to allow the jury to better understand the evidence. The cases cited by the appellant on the question of the power or propriety of the trial court receiving evidence at the viewing reflect one line of authority. However, there is an equally impressive line supporting the trial court conducting a hearing at the scene. Thus, in 23 C.J.S., *Criminal Law*, § 986, p. 994, it is stated:

> "According to other authorities, however, the purpose of the view is to supply evidence, and the information received by taking the view constitutes evidence to be considered by the jury the same as any other evidence introduced in the case. Under this theory it is proper to receive explanatory evidence during the taking of the view."

The landmark case on the conduct of a viewing from the standpoint of due process of law is *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934). In that case the court ordered that the jury view the places material to the charge under consideration — murder. The viewing by

the jury was conducted in the presence of the judge, counsel, and stenographer. The accused was not present; thus, the case presented a more impressive situation for a claim of error. During the course of the viewing, items of concern and interest were called to the jury's attention. The United States Supreme Court found no unconscionable aspects surrounding the case and upheld the conviction. Mr. Justice Cardozo analyzed the aspect of allowing comment or clarification at the scene and found it to be a valid procedure. He stated:

> "Obviously the difference between a view at which every one is silent and a view accompanied by a request to note this feature or another is one of degree, and nothing more. The mere bringing of a jury to a particular place, whether a building or a room or a wall with a bullet hole, is in effect a statement that this is the place which was the scene of the offense, and a request to examine it. When the tacit directions are made explicit, the defendant is not wronged unless the supplement of words so transforms the quality of the procedure that injustice will be done if the defendant is kept away.
>
> "Statements to the jury point out the specific objects to be noted have been a traditional accompaniment of a view for about two centuries, if not longer. The Fourteenth Amendment has not displaced the procedure of the ages."

In *State* v. *Mortensen,* supra, this court found no error in allowing the jury to pace off distances and make measurements. Certainly, the procedure in the instant case, being for purposes of clarification and enlighten-

ment, cannot be said to have harmed the appellant in any manner. Wigmore, *Evidence*, 3rd Ed., § 1802, p. 247, notes:

> " It is, moreover, immaterial that the shower is a *party* or one who will be an *ordinary witness;* indeed his familiarity with the places is assumed to be a special qualification; it is only the pointing out by an unauthorized witness that is improper (supra, par. 2)
>
> "(3) For the same reason, the judge may direct that certain *witnesses repeat their testimony* at the view. This is nothing more than an adjournment of the court temporarily to the place of view, where the holding of the court is temporarily resumed." (Emphasis supplied)

In *Yeary* v. *Holbrook*, 171 Va. 266, 198 S.E. 441 (1938), the case, like the instant one, involved a death by automobile. The judge in effect acted as shower and had witnesses point out places and objects of concern. The Supreme Court of Appeals of Virginia, in passing on the propriety of the viewing, noted the decision in *Snyder* v. *Massachusetts*, supra, and the position of Wigmore. The court found no reversible error, commenting:

> "It would have been better and more in keeping with the general practice for the court to have placed the jury in charge of some officer familiar with the scene and to have authorized him to point out the pertinent objects with no witnesses for either side present. However, in this case the judge himself acted as an official 'shower' and permitted the witnesses for plaintiff and the attorneys for defendants, in the presence of the judge, to point out to the jury objects and locations men-

tioned in the testimony previously introduced. If the court is authorized to select an impartial person to point out pertinent objects and things, surely it is not reversible error for the judge himself to perform this duty.

"We do not approve of the use of witnesses on a view, but inasmuch as the witnesses did not change their testimony in any material way and it affirmatively appearing that the full opportunity was given defendants to show to the jury any and every object and thing mentioned in the testimony, the judgment will not be reversed."

It is the position of the Attorney General that this court is passing upon the legal issue raised by the appeal without benefit of controlling stare decisis. As a consequence, the court may examine not only the facts of this case, which rather conclusively show no prejudice to the appellant other than a fair disclosure of what allegedly transpired, but also the question of whether or not the conduct herein complained of violates any policy of criminal jurisprudence. In *State* v. *O'Day,* 188 La. 169, 175 So. 839 (1937), a situation occurred very similar to that complained of by the instant appeal. The opinion notes:

"This Bill was taken to the ruling of the Court, which permitted certain witnesses to testify at the scene of the crime. The bill recites that the Court was in session at the scene of the crime; that all the officers of the Court, as well as the Jury, the defendant and his counsel, and the prosecuting attorneys were present. The Bill does not object to the visit to the scene, but objects to the taking of testimony at the scene. The scene was visited and testimony taken on motion of the State. All

of the witnesses who testified at the scene of the crime with one lesser exception had already testified in full as State witnesses in the court room. The Court concurred with the State in the belief that it was necessary for a proper understanding of the evidence, and that the Jury may have a fair and better opportunity to pass upon the credibility of certain material witnesses, that the Jury be permitted to visit the locus of the crime, * * *"

The court, in affirming the conviction, stated:

"This Court respectfully believes that it was a matter of necessity as well as intelligent procedure that witnesses point out to the Jury the particular part of the automobile to which the evidence adhered; to have the Jury see for themselves how well the body of the car had been sealed to preserve the evidence in its interior, and consequently how genuine was this evidence to have witnesses show where, in the interior of the car, the fatal bullet was recovered and other material features of the case so necessary for the Jury to have accurate knowledge of . . .

"* * * The purpose of a trial is to ascertain the truth. It is impossible to bring the locus into the court and introduce it in evidence. It is now well recognized, and there is no dispute herein raised to the contrary, that Courts may take the jury to view the scene. Upon examination of the authorities of the different States, we find two theories as to whether or not a view of the scene constitutes the taking of evidence. One theory holds that a view of the scene does not constitute taking of evidence. The other theory, in our opinion conforming more to reason, is that a view of the scene does constitute the taking of evidence. . . . It is only reasonable that, viewing the scene, the physical facts and the circumstances sur-

rounding the scene is as much the taking of evidence as taking the testimony of witnesses. A view of the scene without explanation might confuse the jury. Such confusion in many instances might operate against the defendant and do him great harm. Such confusion may defeat justice. The explanation of the locus would enable the jury to determine the real truth. Neither the State or the defendant have any right to complain at injury caused by the truth. Witnesses are permitted to draw diagrams of the locus, while testifying in court, and to testify and explain the locus from the diagram and to point out the different objects on the diagram to the jury. It does not conform to reason to say that you can draw a diagram of the locus and explain it with testimony but cannot point out the objects at the locus and explain it with testimony. It would seem that it would be better to explain the locus by testimony on the scene so that the jury would have a clear understanding of all the testimony in the case. It is best that the jury clearly understand the case. It is to be borne in mind that the average juror has had very limited experience in the trial of cases and often it is very difficult for them to get a clear picture of the locus, the position of the different witnesses and objects from a detailed narration of the same by the witnesses. It is better in many instances to aid a jury by taking it to the scene and having the scene explained to them in order that they may clearly understand it and arrive at the real truth with reference to it. It could not be said that an explanation of the scene clarifying the testimony given in the trial did not give the defendant a fair and impartial trial. As a matter of fact it would make the trial fairer and more impartial. . . . We cannot see how it could injure the defendant to explain and clarify the scene and obtain the truth.

> "If it is in the discretion of the Court to permit the jury to view the scene, it is also within the discretion of the Court to permit the taking of evidence at the scene to explain it. There is nothing in the record to show any abuse of this discretion."

Clearly, sound judicial procedures will better serve the ends of ascertaining truth so that justice may be done. The procedure adopted by the trial court in this instance was geared toward allowing the jury to fully appreciate the testimony previously given. Counsel, the accused, the judge, and reporter were present. The proceedings, but for the absence of the austere surroundings of a courtroom, did no violence to the judicious search for truth. Clearly, no prejudice could result or did result and no basis for reversal is shown.

POINT III

THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING THE DEFENDANT'S MOTION TO STRIKE OFFICER BURCH'S TESTIMONY AS TO CHORD MEASUREMENTS.

At the time of trial, Officer William Burch of the State Highway Patrol testified that he arrived at the scene of the accident within a few minutes of the accident (T. 25-27). He marked the position of the overturned vehicle (T. 27), and then a few hours later took measurements of the vehicle markings, which were still visible (T. 29). He testified without objection to the measurements he made, including the chord mark measurement (T. 31-34).

On cross-examination, the defense counsel, using a transcript, called the officer's attention to a statement he made at preliminary hearing, wherein he indicated that he did not know if he even measured the chord mark (T. 139). After that, the following question was posed at T. 139:

> "But, now, on redirect examination it is your testimony — let me rephrase that. On direct examination you testified as to particular points that you measured it from, is that right?
>
> "That's right."

Thus, the effect of the evidence at this stage was only that Officer Burch's testimony may have been impeached. Thereafter, the record reflects at T. 139:

> "All right. Now, then, on redirect examination, you testified that you got those marks after the preliminary hearing by you and Sergeant Reid and Mr. Mason sitting down and discussing it, is that right?
>
> "We remembered where we measured.
>
> "And you came up with a mark for purposes of this trial, isn't that right, Officer?
>
> "That is not right.
>
> "The three of you discussed it and came up with a mark, isn't that right?
>
> "We remembered where we measured it.
>
> "After the preliminary hearing?
>
> "That's right."

Subsequently, counsel made a motion to strike (T. 140). The trial judge denied the motion to strike, stating the following reason at T. 140:

> "* * * Mr. Burns, my thinking on it is this: The fact that the officer later discusses the point that was made at the preliminary hearing and his recollection is refreshed does not prove that it is fabricating anything; and I don't think his testimony so shows. It may or may not, I'll leave that up to the Jury; but the fact that he discussed it with Officer Mason and Officer Reid and between them by discussing this, his recollection is refreshed and he testifies with regard to a certain item in this case doesn't prove that he is fabricating anything either now or before. It proves merely his testimony is different by reason of the fact that his testimony may be now fabricated — it might be fabricated before or it might be truthful on both occasions because he didn't recall before and he now recalls by virtue of having it refreshed. I'm going to overrule and deny your motion and leave that point up to the Jury."

No evidence was offered to show that the evidence, in fact, was not the result of Officer Burch's independent recollection after discussing the matter with other officers. Further, his testimony on direct examination was that of a witness testifying to his own recollection. Therefore, at least, the evidence presented a question for the jury, which is what the court indicated.

In Abbott, *Criminal Trial Practice*, 4th Ed. § 353, it is stated:

> "The failure to object to a question before answer, if the grounds of objection were then

apparent, precludes a subsequent motion to strike out the answer."

Counsel in the instant case had the preliminary hearing transcript and could have tested the witness's memory by voire dire[2] examination or objected until foundation had been laid to show the witness was, in fact, testifying from his own memory. Consequently, it is apparent that the motion came too late.

A motion to strike in the first instance is not a favored procedure. Abbott, supra, § 352, and the motion is usually a matter for the sound discretion of the trial court. Thus, in 23A, C.J.S., *Criminal Law*, § 1069, p. 45, it is noted:

> "The grant or refusal of a motion to strike improper evidence may be viewed as a matter within the sound discretion of the court, as where the evidence was admitted without objection, see infra § 1070. Thus a motion to strike evidence because of facts elicited on cross-examination showing it to be incompetent has been held to be discretionary with the court."

From the evidence in the instant case, it does not clearly appear that the officer had testified apart from his own memory. He indicated that the discussions he had with the other officers caused him to recall the chord measurement. The effect of his testimony was properly left to the jury to accord it what weight they would. No error can be claimed on this basis.

---

[2] A procedure the appellant used numerous times during the trial.

POINT IV

THE EVIDENCE AMPLY ESTABLISHES THE APPELLANT'S GUILT BEYOND A REASONABLE DOUBT.

The appellant contends the evidence is insufficient to establish his guilt. It is submitted that there is no merit to such a contention. In *State* v. *Berchtold,* 11 U. 2d 208, 357 P. 2d 183 (1960), this court stated with reference to viewing the sufficiency of the evidence on appeal from a conviction for negligent homicide in violation of 41-6-43.10, U.C.A. 1953:

> "We reverse a jury verdict only where we conclude from a consideration of all of the evidence and the inferences therefrom viewed in the light most favorable to such verdict that the findings are unreasonable."

Viewing the evidence in a light most favorable to the jury's verdict, it is clear that the evidence is amply sufficient to sustain the conviction.

The evidence discloses that the appellant drove his vehicle up Cedar Canyon at far in excess of the posted speed limit of 50 miles per hour. Persons who viewed his speed or were riding with him estimated his speed as high as 70 miles per hour (T. 317, 329). The terrain was a winding, curving, canyon road. The appellant's vehicle was specially built for high speeds, so that estimates might reasonably be far less than actual speed, and most of the estimates were given by witnesses favorable to the appellant. The journey took place at nighttime after the accused had consumed at least four beers

and maybe more. Although the appellant may not have been drunk the consumption of alcohol must have had some effect on his person, if no more than to relax his reeaction time. Thus, in Campbell, *Courts and Prosecutors Are the Weak Link in Preventing Drunk Driving*, 46 A.B.A.J. 43 (1960), at p. 45, it is stated:

> "The Committee on Medical Aspects of Automobile Injuries and Deaths of the American Medical Association more recently has published a 'Medical Guide for Physicians in Determining Fitness to Drive a Motor Vehicle.' 'Two 12-oz. bottles of 3.2% beer or 2 oz. of 100 proof whiskey consumed within one hour will put the average moderate drinker in the zone of impaired driving ability, i. e., with over 0.035% alcohol in the blood . . .' "

The testimony of the highway patrol experts put the speed of the appellant's car at between 99 to 100 miles per hour, based on over 700 feet of scuff and skid marks. At the start of the trip, appellant showed little concern for safety by running a stop sign. Appellant, immediately after the accident, admitted racing and accepted guilt for Christine Lambert's death. The evidence presented in this case is very, very similar to that before the court in *State* v. *Berchtold*, 11 U. 2d 208, 357 P. 2d 183 (1960), where this court found the evidence sufficient to convict. In that case, a young girl was also killed where the car rolled over on a turn. Clearly, the evidence in the instant case meets the test required under the law to convict.

CONCLUSION

The instant case merely accentuates the fact that skillful counsel can always find something to raise on appeal. However, the record in this case also demonstrates an unusually cautious and fair attitude on the part of the trial judge, who appeared to be seeking only the truth. The appraisal of the errors claimed, against the record as it actually exists, makes it manifest that the appellant was in no way prejudiced except by the truth. This court should affirm.

Respectfully submitted,

A. PRATT KESLER
Attorney General

RONALD N. BOYCE
Chief Assistant Attorney General
State Capitol
Salt Lake City, Utah
Attorneys for Respondent