

1969

## State of Utah v. Glen W. Mecham : Brief of Respondent

Utah Supreme Court

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Glen W. Mecham; Appellant in Pro Se

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### Recommended Citation

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# In The Supreme Court of the State of Utah

STATE OF UTAH,

Respondent

vs.

GLEN W. MECHAM

Appellant

## BRIEF OF RESPONSE

Appeal from the Judgment of the District Court  
for Utah County, entered  
the Honorable District Judge

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# In The Supreme Court of the State of Utah

STATE OF UTAH,

Respondent,

vs.

GLEN W. MECHAM

Appellant.

Case No.  
11527

## BRIEF OF RESPONDENT

### RELIEF SOUGHT ON APPEAL

Respondent submits that the judgment of the District Court of Utah County be affirmed.

### STATEMENT OF FACTS

This is an appeal from a court finding of guilty to the crime of indecent assault.

### DISPOSITION IN LOWER COURT

After a trial without jury, the lower court judge found defendant-appellant guilty and he was sentenced to an indeterminate term not to exceed five years in the Utah State Prison, as provided by law.

### RELIEF SOUGHT ON APPEAL

On or about August 2, 1968, Lou Ann Cordner, the complaining witness in this case, was retrieving her brother's bicycle from the area around defendant-appellant home. He approached her and asked her how old she was, what grade she was in and commented that she was just the right age (T.7). Defendant

said that he liked Lou Ann and asked her to be his girl, kissed her on her hands and felt her breasts (T.7). Lou Ann testified that the defendant-appellant felt her breasts and her private area and rubbed her on her body. He also asked her to get into an old car which was situated behind his house so that "he could suck my breasts." Lou Ann told him that she had to go home, at which time defendant asked her if he could feel her one more time and she told him no (T.8). According to Lou Ann, he also placed his hand underneath her panties. Lou Ann returned home and related the experience to her mother who went next door to talk to Mrs. Thomas, the Relief Society president, and Mrs. Thomas advised her to call the police (T.10).

Lou Ann's mother, Mrs. Shirley Cordner, testified that when Lou Ann returned home she burst into tears, was unable to talk to her, and finally after playing twenty questions with her daughter, Mrs. Cordner was able to get from Lou Ann simply the words "Mr. Mecham." The incident in question was detailed to Lou Ann's mother in bits and pieces after that (T.17).

The story related by Lou Ann Cordner on the witness stand was substantially the same as that which she told her mother immediately after the incident. Mrs. Cordner also testified as to the red marks on the chest area of Lou Ann (T.19). Lou Ann reported to her mother that these marks were a result of the rubbing of the defendant's hands in that area.

Mrs. Margene Tadd, Orem City Secretary, testified that on the afternoon in question at about 4:00 p.m. she had occasion to examine the complainant, Lou Ann Cordner, and found a raw spot around her breast area about two inches in diameter (T.25).

After Mrs. Tadd's testimony, the State rested its case and a motion to dismiss the complaint on grounds of failure to establish a prima facie case was denied by the State (T.27).

Defendant-appellant, Mr. Mecham, took the stand and denied commission of the offense claiming that he had never seen Lou Ann on the day of the assault (T.30). Defendant claimed in his testimony to have never been out of the presence of some person during the day, not even to go to the bathroom (T.31). However, in later testimony, a neighbor boy, Mark Sydall, who spent most of the day with Mr. Mecham, testified that Mr. Mecham did go to the bathroom during the day (T.50).

After a complaint was sworn out charging the defendant with the crime of indecent assault, Richard O. Chatterton, police officer for Orem City, was given the job of serving a felony warrant on the defendant with a Detective Ward (T.70). In his testimony to the court, Mr. Chatterton indicated that he was detailed to watch the rear door of the house when they went to serve the felony warrant on Mr. Mecham. Officer Chatterton testified that he saw a person coming out of the bedroom window. He told him to hold it right there and the person fell to the ground (T.71). Officer Chatterton told the person to stand up and to put his hands against the side of the house. He searched the man and found no weapon, handcuffed him and put him under arrest (T.72). Officer Chatterton identified the defendant as the person he arrested attempting to escape from the home at the same time Officer Ward was attempting to serve the felony warrant (T.72).

After closing statements by the State and the defense, the Court entered a finding of guilty of the charge of indecent

assault (T.78). The words of the Court are important for basis of considering defendant's appeal:

"I thing the little girl was telling the truth. The event may not have occurred on the 2nd day of August, but on some date very close to that time.

It seems to me that it couldn't very well have been a fabrication of what she said.

I don't need to find that the witness other than the defendant falsified. They may have done but it may have been just a mistake. It may have been a different day that this occurred. I don't know.

The court finds the defendant guilty as charged." (T.78).

The judgment of commitment was entered on the 27th day of December, 1968, by Judge Maurice Harding. The defendant requested probation, which was refused. The defendant was remanded to the custody of the Utah County Sheriff to be delivered to the Warden of the Utah State Prison for an indeterminate term or not more than five years.

## ARGUMENT

### POINT I

THERE IS NO "PRESUMPTION OF REASONABLE DOUBT" IN CRIMINAL CASES, AND THE FINDING OF GUILTY BY THE LOWER COURT WAS AMPLY SUPPORTED BY THE EVIDENCE AND WAS NOT CONTRARY TO THE LAW.

The first point raised by appellant is in regards to the following language of the judge in finding appellant guilty of "in-



decent assault.” (Utah Code Annotated 1953, § 76-7-9.)

“I think the little girl was telling the truth. *The event may not have occurred on the 2nd day of August, but on some date very close to that time.*

“It seems to me that it couldn’t very well have been a fabrication of what she said.

“I don’t need to find that the witnesses, other than the defendant, falsified. They may have done. *But it may have been a different day that this occurred. I don’t know.*

“The Court finds the defendant guilty as charged.”

Tr., at 78. (Emphasis supplied.)

Appellant contends that since the information returned charged him with an offense committed “on the 2nd day of August, 1968,” (R.11), the comments of the judge that the offense might have occurred on “some date close to that time” (Tr. 78) show the failure of the evidence to conform to the time alleged in the information, and that therefore a conviction was not warranted.

Utah Code Annotated 77-21-12 is relevant on this point:

“(1) An information or indictment need contain no allegation of the time of the offense unless such allegation is necessary to charge the offense under Section 77-21-8.

“(2) The allegation in an information or indictment that the defendant committed the offense shall in all cases be considered an allegation that the offense was committed after it became an offense and

before the filing of the information or indictment, and within the period of limitations prescribed by law for the prosecution of the offense."

Appellant was charged with the offense of indecent assault (76-7-9) which does not require a specific allegation of time to charge the offense under 77-21-8. The statute on "Time," *supra*, reflects the common law of the State of Utah on the immateriality of time in charging a crime. *State v. Sheffield*, 45 Utah 426, 146 P. 306 (1915).

In *State v. Cox*, 106 Utah 253, 147 P.2d 858 (1944), this Court held that time allegations were not necessary to charge the crime of murder, and said:

"We have repeatedly held that the allegation of time is immaterial, that regardless of the time alleged, except where made certain by a bill of particulars, the State may prove the offense at any time within the statutory period of limitations."

*Id.*, at 256. (It should be noted here that no bill of particulars was filed in the instant case, so therefore the allegation of time was immaterial.)

Where a defendant was convicted of carnal knowledge, this court held *time* to be immaterial, so long as a specific *place* was alleged and proven, in *State v. Distefano*, 70 Utah 586, 262 P. 113 (1927). In that case, testimony was received of several acts of intercourse, but the one proven was a single act in a single locale, and the conviction was affirmed. The Court said:

"It is therefore well established in this jurisdiction that where time is not of the essence of the crime

the exact time is immaterial, and if the evidence otherwise supports the charge relied upon by the prosecution, a conviction may not be set aside because the crime was committed after the date charged in the information or indictment, so long as it was committed prior to the beginning of the prosecution."

*Id.*, at 595. See also: *State v. Gates*, 118 Utah 117, 220 P.2d 115 (1950).

In the *Distefano* case, this Court also said that usually any day within the statute of limitations can be proven, regardless of what is alleged. 70 Utah, at 593.

Clearly, on the basis of both Utah case law and the applicable statute (Utah Code Annotated, 77-21-12) no error is present in the findings of the trial court that the offense alleged to have been committed on August 2nd, 1968, might have been committed on another day.

In his statement of points, appellant raises as Point IV issues substantially covered by Point I, except the last line, which alleges a defense alibi. However, appellant has not argued the matter in the body of his brief, and presumably does not now wish to raise that issue. Under Utah law, time does become material if the defense of alibi is raised. *State v. Cooper*, 114 Utah 531, 201 P.2d 764 (1949). But defendant did not raise the issue at trial, and by not arguing "alibi" in his brief must be deemed to have waived it on appeal.

Although this Court has not, to respondent's knowledge, passed on the issue of waiver of defenses, the rulings of our sister states clearly hold matters not argued in brief are deemed waived on appeal. See: *State v. Brown*, (Washington), 447 P.2d 82 (1968).

In *People v. Goodall*, 231 P.2d 119 (1951) the Fourth District Court of Appeals in California held that the duty of an appellant to cite authorities and argue points raised in his brief was affirmative and could not be shifted to the respondent or the court. *Id.*, at 123.

Appellant further contends that the complaining witness, Lou Ann Cordner, told a "direct lie" and that the law would not support the finding of guilty.

It is a principle so well established as to need no citation to authorities that the credibility of a witness is for the court to decide, and that only a clear abuse of discretion will be disturbed on appeal.

A proper foundation was laid by the prosecuting attorney for the use of Lou Ann's testimony (Tr. 5, 6). Statutory law has erased the former restrictions on children serving as witnesses: Utah Code Annotated 78-24-1,2.

Under Section 1, all persons, without exception, may be witnesses, who have organs of sense, can perceive, and make known their perceptions to others.

Under Section 2, children under ten years of age "who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly," are not permitted to be witnesses.

Lou Ann was at time of trial eleven years old (Tr. 4) and hence was competent under Utah law to testify even without the foundation laid by the prosecutor.

It may be noted that Utah Code Annotated 77-44-1 pro-

vides the competency of witnesses in criminal actions is to be determined by the civil rules. (The exceptions to this rule provided for in the criminal code are not applicable in instant case.)

If the trial judge chose to accept the testimony of the complaining witness, and from his preferred position of observation rejected the disclaimers of defendant, this Court should not disturb the findings of the lower court. Most often, in these type of offenses—committed in stealth and secrecy—the testimony of the youth is the only one available, and the trial court, or jury, must determine credibility from its preferred position of observation of the witnesses. *State v. Smith*, 16 Utah 2d 374, 376, 401 P.2d 445 (1965).

Finally, appellant argues that all doubt be resolved in his favor due to the presumption of innocence. Of course, his belief that there was doubt as to his guilt was evidently not shared by the Court: "I think the little girl was telling the truth." (Tr. 78).

Appellant cites several state court cases in support of this contention that all doubt as to guilt must be resolved in his favor. Respondent will stipulate that the holdings of these cases are as appellant contends, except as to the case of *People v. Lowe*, 209 California 199, 286 P. 697 (1930), cited at p. 14, appellant's brief. The quotation there reproduced was not found in the reports of that case.

Respondent respectfully submits that appellant's doubt was not shared by the Court, and that resolving of any doubt of guilt in favor of an accused occurs not if the doubt is in the mind of the accused, but if doubt exists in the mind of

judge or jury. On the basis of the record, and given the lower court's statement that he accepted Lou Ann's testimony and not defendant-appellants (Tr. 78), there was not doubt to be resolved in favor of appellant's innocence.

## POINT II

THE CONSTITUTIONAL GUARANTEE OF A PUBLIC TRIAL MAY BE WAIVED BY A DEFENDANT OR HIS COUNSEL, AS OCCURRED IN INSTANT CASE.

The Sixth Amendment to the United States Constitution contains a guarantee of a public trial that is applicable to the States through the due process clause of the Fourteenth Amendment.

Utah's Constitution contains a similar guarantee in Article I, Section 12, which details the rights of accused persons. The right to a public trial has also been codified: Utah Code Annotated, 77-1-8(6).

Appellant contends he was denied his right to a public trial when, on motion of the State, the courtroom was cleared of all except the defendant and court personnel. (Tr. 3, 4).

Although appellant cites no cases in support of this alleged error, the law of Utah clearly entitles an accused to a public trial. *State v. Jordan*, 57 Utah 612, 196 P. 565 (1921). The power to exclude certain witnesses under the statute is applicable to criminal procedure. *Id.*

However, a defendant clearly may waive this right, either personally or through counsel. *State v. Smith*, 90 Utah 482, 62 P.2d 1110 (1936) where this Court said:

"The record does not show a verbal concurrence by either the defendant or his counsel to the stipulation (to clear the courtroom) announced by the district attorney, but it does show that they were present in court and acquiesced silently in the stipulation stated."

*Id.*, at 491-492.

Turning to the transcript of appellant's trial, we find a similar acquiescence by silence of both appellant and his counsel (Tr. 3, 4).

Particularly, Mr. Ivins, the district attorney, asked for exclusion of spectators, including witnesses, then said: "Maybe Mr. Taylor (appellant's counsel) would join with me in consenting that this be done?" Appellant, and his counsel, failed to respond, indicating acquiescence. Later, Mr. Taylor said, "You want to exclude all witnesses, until they testify, is that what you want?" But neither he, nor appellant objected to the exclusion order of this Court.

Under the rule of *State v. Smith, supra*, appellant clearly waived his right to a public trial on the basis of the record, which shows both he and his counsel were present at the time the State requested exclusion and failed to object to the Court's order (Tr. 3, 4).

Every case which respondent has found which reversed a conviction for failure to grant a public trial involved a case of defense objections made to a court's exclusion orders. *State v. Meyers*, 14 Utah 2d 417, 385 P.2d 609 (1963); *State v. Jordan, supra*; *State v. Beckstead*, 96 Utah 528, 88 P.2d 461 (1939).

Since defendant-appellant, or his counsel, failed to object to the exclusion order, he therefore waived his right to a jury trial. Appellant is bound by the actions of his counsel. *See: State v. Farnsworth*, 13 Utah 2d 103, 368 P.2d 914 (1962), where this Court said:

"The record indicates no action or inaction by the trial attorney which could not rationally find explanation in a legitimate exercise of strategy—particularly when the case was tried before a judge without a jury."

*Id.*, at 104.

Although the traditional rationale of exclusion is to protect youthful witnesses when they must recite intimate personal details, respondent submits that the action of appellant's counsel in acquiescing to the State's request for exclusion may find "explanation in a legitimate exercise of strategy." This was a case of indecent assault. Appellant's counsel may have felt public sentiment might be running against his client, and that his client's interests might best be protected by the exclusion order.

Appellant expresses the belief that had the public been present, to see and hear what went on behind closed doors, there would not have been a finding of guilty.

The answer is that the public can at least "hear," by reading the public record, what went on. Appellant's fears might have been well-founded in the days of the Inquisition, stocks, and the rack, but respondent contends our present judicial system has gone to great lengths to protect the accused in criminal cases, witness this appeal. Defense counsel was present to



assure appellant would not be subjected to any inquisitorial procedures so common in the Dark Ages.

One further point. As noted earlier, most cases in the area of the right to a public trial involve denial of defendant's motion for a public trial, or defendant's objection to a trial court's exclusion order. Herein, appellant was not denied a public trial because he never demanded one, nor did he object to the exclusion of the court. It might therefore be said that no denial of a public trial actually took place.

### POINT III

THAT THE COURT BELIEVED THE COMPLAINING WITNESS, AND NOT DEFENDANT'S "UNIMPEACHABLE WITNESSES," IS NO GROUNDS FOR REVERSAL.

Appellant alleges it was an abuse of trial court's discretion to "ignore the undisputed testimony of five (5) mature adults, un-impeachable(sic) alibi witnesses," and to base its finding on the testimony of an eleven year old complaining witness, where "such testimony is contrary to scientific evidence accepted by trial court."

Respondent has searched the record in vain for any "contrary scientific evidence" that might run counter to Lou Ann Cordner's testimony. Appellant did inject into his statement of facts many matters not of record, but none of these could even be termed "scientific evidence" contrary to Lou Ann's testimony. (See: for instance, the measurement of appellant's back fence, stated as 3½ feet high at page 6 of appellant's brief, which fact was not proved at trial.)

Earlier, respondent cited the case of *State v. Smith*, *supra*

at 4, to answer appellant's objections to being convicted on the basis of a youth's testimony. In that case, a six year old's testimony was found competent to convict the accused of indecent assault under the same statute as the instant case. Utah Code Annotated 76-7-9.

This Court said that the main requirement for witnesses under ten years of age as to competency was that they have sufficient intelligence and maturity to understand questions put to them, knowledge of the subject and facts involved, ability to remember and a sense of moral duty to tell the truth. 16 Utah 2d, at 377. The ruling of a trial court on competency will not be disturbed on appeal in absence of a clear showing of abuse. *Id.*

The following language in the *Smith* decision is especially relevant to appellant's contentions:

"[I]t must be borne in mind that when such an offense is committed, it is done with the greatest possible stealth and secrecy, so that most often the testimony of the victim, coupled with the type of corroboration we have here, is the only evidence available upon which to determine guilt or innocence."

*Id.*, at 376.

Respondent also draws the attention of this Court to the Utah statutes on witnesses, cited *Supra* at 4, and the fact that Lou Ann was presumed competent by law to testify, even if the district attorney had not, as he did, laid the usual foundation for child witnesses.

*See also State v. Dixon*, 114 Utah 301, 199 P.2d 775

(1948): six year old boy competent to testify in "infamous crime against nature" case; *State v. Williams*, 111 Utah 379, 180 P.2d 551 (1947): 13 year old case; with mental age of 8-10 years, competent witness in rape case; *State v. Sanchez*, 11 Utah 2d 429, 361 P.2d 174 (1961): statutory rape case, ten year old prosecutrix competent witness.

The transcript does not bear out appellant's contention that the trial court ignored or disbelieved the five defense witnesses:

"THE COURT: I thing the little girl was telling the truth . . . .

I don't need to find that the witnesses, other than the defendant, falsified."

(Tr.78). Clearly, the Court restricted its findings to (1) that the alleged assault occurred as Lou Ann Cordner claimed, (2) that defendant lied in denying the commission of the offense, and hence (3) appellant was guilty of indecent assault.

Since the trial court was in a position to observe the demeanor of the witnesses, his findings should not be disturbed on appeal in absence of a showing of clear abuse of discretion.

As further error under Point II, appellant contends his counsel should have called a witness, a Miss Janice Church, now his daughter-in-law, Mrs. Richard V. Mecham. Appellant contends that she would have testified as to the period when the alleged assault occurred, as she was in the company of his son Richard Vincent Mecham, at the time.

Respondent submits the defendant counsel's choice of witnesses to call is not a proper matter for appeal. This is a

matter of strategy, and as noted in *State v. Farnsworth*, supra at 7, there is nothing in defense counsel's decision to exclude a witness "which could not rationally find explanation in a legitimate exercise of strategy." 13 Utah 2d, at 104. Since the record fails to show incompetency of appellant's counsel, appellant cannot complain. *State v. Abbott*, 21 Utah 2d 307, 445 P.2d 142 (1968).

Since the excluded witness was at all times relevant to the case in the company of appellant's son, Richard, who did testify extensively (Tr. 51-60) counsel might have concluded her testimony was not needed. Richard Mecham was subjected to stringent cross-examination by the district attorney, and counsel may have wished to avoid granting the State a similar opportunity with Richard's wife. There is no evidence available as to Mrs. Richard Mecham's availability or willingness to testify, both of which may have been factors in defense counsel's decision not to utilize her as a witness.

Appellant cites in support of raising new matter on appeal presumably by the potential testimony of Mrs. Richard V. Mecham - the case of *Brooks v. State*, 209 Mississippi 150 (1950), and characterizes it as a United States Supreme Court case. Appellant's brief at 17.

First of all, the case cited is a Mississippi Supreme Court case, reported in 209 Mississippi 150 and 46 So.2d 94. As such, it details the Mississippi rule on raising new matter on appeal.

The Utah rule is clearly contra: *State v. Starlight Club*, 17 Utah 2d 174, 406 P.2d 912 (1965), where this Court held it was not constrained to canvass a matter raised for the first time on appeal, and that it would not reverse a conviction on

matters dehors the record. *Id.*, at 176.

Secondly, in the *Brooks* case, the Court was concerned with constitutional due process process rights, whereas herein appellant's concern is for the trial strategy adopted by his counsel, which respondent has shown to be binding on appellant in this instance.

Appellant's Point III is clearly no grounds for reversal of his conviction.

### CONCLUSION

Respondent respectfully directs this Court's attention to the last two lines of page 15 of appellant's brief wherein he admits that he is "grabbing straws" and trying to save himself. Respondent stipulates that such seems to be the case. In fact, respondent submits such is the case inasmuch as appellant's brief has not advanced any legitimate legal reason or justification for reversing his conviction of indecent assault.

Respondent respectfully submits that this Court should affirm the conviction of appellant based on the findings of the Honorable Judge who presided in the trial court below. Appellant's right to a jury trial was effectively waived by himself and his counsel at trial and the fact that the Court chose to believe the complaining witness and not the defendant nor his "unimpeachable witnesses" is no grounds for reversal. The conviction below should be affirmed.

Respectfully submitted,

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