

1970

## State of Utah v. Michael Dale Gill : Brief of Respondent

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

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STATE OF UTAH,

*Plaintiff-Respondent*

vs.

MICHAEL DALE GILL,

*Defendant-Appellant*

---

**BRIEF OF RESPONDENT**

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Appeal from a Conviction of the  
Federal District Court, in and for  
the State of Utah, the Honorable Merrill G. [?]

VERNON [?]  
Attorney General

LAUREN [?]  
Chief Assistant  
206 State Capitol  
Salt Lake City,  
Utah

Attorney

JOHN D. O'CONNELL  
211 East Fourth South  
Salt Lake City, Utah

STEWART M. HANSON, JR.  
400 El Paso Natural Gas Building  
Salt Lake City, Utah

*Attorneys for Appellant*

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**IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH**

---

STATE OF UTAH,  
*Plaintiff-Respondent,*  
vs.  
MICHAEL DALE GILL,  
*Defendant-Appellant.*

Case No.  
11783

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**BRIEF OF RESPONDENT**

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**STATEMENT OF THE CASE**

The appellant was convicted by a jury of the crime of robbery in the District Court of the Third Judicial District, County of Salt Lake, State of Utah, the Honorable Merrill C. Faux, Judge, presiding.

**DISPOSITION IN THE LOWER COURT**

The appellant was tried and convicted of robbery June 2, 1969, and subsequently sentenced to an indeterminate term in the Utah State Prison.

**RELIEF SOUGHT ON APPEAL**

The respondent prays this Court will affirm the action of the trial court below.

## STATEMENT OF THE FACTS

The respondent wishes to make his own statement of the facts notwithstanding the statement made by appellant on pages 2 through 5 of his brief.

On November 4, 1967, Harman's Take-Home Cafe, located in Salt Lake City, Utah, was robbed by two men (T. 6-8). Marilyn Marx, manager of Harman's, was present during the robbery (T. 6-8), as was Sheryl Kimball (T. 6). Subsequently, Marilyn Marx was taken to a lineup and purportedly identified the appellant as the one having committed the crime (T. 13-14); however, such identification was not entered as evidence by the State. Subsequently, at trial, Marilyn Marx made an in-court identification of the appellant based on her recollection of the appellant during the commission of the alleged crime (T. 5-12) as did Sheryl Kimball (T. 24-25). Moreover, Linda Fehmal, who admitted being an accessory to the crime (T. 28-33), also identified the appellant as the perpetrator (T. 28-33). After all the evidence had been presented and the jury instructed, a verdict of guilty was returned by the jury (T. 7-8).

## ARGUMENT

## POINT I.

THE TRIAL COURT DID NOT ERR IN PREVENTING CROSS-EXAMINATION WHICH WAS IRRELEVANT TO THE ISSUES BEFORE THE COURT.

The appellant contends that he was prejudiced because his counsel was not allowed to cross-examine a prosecution witness, Marilyn Marx, as to the circumstances surrounding a lineup conducted prior to the trial. He further contends that such cross-examination was proper as a means of testing the credibility of the witness's subsequent in-court identification and that the court erred when it sustained the prosecution's objection to such cross-examination on the grounds that it was irrelevant and outside the scope of direct-examination.

The respondent admits that cross-examination of a witness is a matter of right, *Alford v. United States*, 282 U. S. 687 (1931), and that wide latitude should be allowed in cross-examination if such examination would elicit facts that would help rather than confuse the jury, *State v. Day*, 236 Or. 458, 389 P. 2d 30 (1964). However, the court may refuse to permit questions on cross-examination where the information sought to be elicited is irrelevant, *Gallegos v. People*, 157 Colo. 484, 403 P. 2d 864 (1965), *cert. denied*, 383 U. S. 971, and was not testified to on direct-examination, *State v. Stevens*, 119 Mont. 169, 172 P. 2d 299 (1946). Moreover, it is the prerogative of the trial court to decide whether or not such cross-examination is proper or improper, *State v. Anderson*, 46 Wash. 2d 864, 285 P. 2d 879 (1955), and, unless it can be shown that the court abused that discretion, the ruling should not be disturbed on appeal.

The dialogue in question is quoted on pages 3-5 of appellant's brief. It can readily be seen that there were

only two questions which counsel for appellant was permitted to ask. Both of these questions dealt with whether or not there were any Mexicans or Negroes in the lineup which was conducted prior to trial; however, the results of the lineup never came in as evidence during the course of the trial. Notwithstanding, the appellant contends that he should have been allowed to ask questions as to the nature of the lineup as a means to test the credibility of the witness's in-court identification of the appellant.

However, the in-court identification was not based on the lineup; rather, it was based on the witness's recollection of the appellant during the commission of the alleged robbery (T. 5-12). The appellant contends, however, that the witness's recollection may have been tainted by the lineup, thus placing the credibility of the in-court identification in issue. Such a theory of impeachment is permissible under the law; however, it is the position of the respondent that the appellant was afforded every legal right to attempt impeachment based on that theory. The appellant was permitted to ask whether or not there was a lineup (T. 13) and whether or not the witness had been told the name of the appellant at the lineup (T. 13). Moreover, the appellant was permitted to cross-examine as to whether or not the witness knew the brother of the appellant, James Gill (T. 12, 13). Obviously, the thrust of the questions was to show that the witness may have confused the appellant with his brother, James, and that had it not been for the lineup, the in-court identification could not have been made. The dialogue quoted on pages 3-5 of appellant's brief shows

that the appellant was in fact granted sufficient scope on cross-examination to raise the impeachment inference. However, there is no basis on which one could argue that the questions objected to, i.e., whether or not there were Negroes or Mexicans in the lineup, had any relevancy to whether or not the witness had confused the identity of the appellant with his brother James. Such questions go to the constitutional validity of the lineup which was not in issue in this case because the in-court identification was not entered as evidence. Moreover, such questions had no bearing on the issue of the witness's credibility. Clearly, the questions were irrelevant and had no purpose other than to confuse the jury and cloud the real issues before the court.

## POINT II.

IF THE LOWER COURT COMMITTED ERROR  
IN RESTRICTING THE SCOPE OF APPEL-  
LANT'S RIGHT OF CROSS-EXAMINATION,  
SUCH ERROR WAS HARMLESS AND IS NOT  
GROUNDS FOR REVERSAL.

Utah Code Ann. § 77-42-1 (1953) provides:

“After having an appeal the court must give judgment without regard to errors or defects which do not affect the *substantial rights* of the parties. If error has been committed, it *shall not* be presumed to have resulted in prejudice. The court *must be satisfied* that it has that effect before it is warranted in reversing the judgment.” (Emphasis added.)



The principles embodied in this statute are in accord with current constitutional law. In *Chapman v. California*, 386 U. S. 18 (1967) the United States Supreme Court ruled that error "harmless beyond a reasonable doubt," *Id.* at 21, is not grounds for reversal even if the alleged error deals with constitutional rights. Based on these principles this Court in *State v. Anderson*, 68 Utah 551, 251 P. 362 (1926) said on the issue of improper cross-examination:

"Conceding that it is not proper to ask a witness, either on direct or cross-examination, to measure the testimony of other witnesses, still, *in view of the whole record in this case*, the questions asked and the answers given could, in no way, be prejudicial to appellant." (Emphasis added.) 251 P. at 363.

Although the *Anderson* case dealt with questions asked on cross-examination which were improperly allowed as distinguished from the instant case where the questions were not permitted, the principle is the same, i.e., unless the appellant can show *substantial prejudice in view of the whole record*, due to the alleged error, he is not entitled to a reversal.

The respondent submits, in view of the whole record, that appellant's rights were not substantially prejudiced. It is clear that appellant's theory was that Marilyn Marx had mistaken James Gill, the brother of the appellant, for the appellant himself. Based on this theory, the appellant was able to cross-examine Marilyn Marx regarding her knowledge of James Gill (T. 12, 13). He thoroughly cross-examined her on her perceptivity of the events

...relating the alleged crime (T. 14-20), and as to her ability to distinguish physical differences between James Gill and the appellant (T. 20, 21). Later, the appellant presented evidence that in fact James Gill and not the appellant had committed the alleged robbery (T. 42-44). Thus, it seems clear that appellant was granted every reasonable latitude to convince the jury that James and not the appellant had committed the crime. It would be stretching reason to conclude that the appellant was substantially prejudiced because the court denied him the right to ask Marilyn Marx if there were Mexicans or Negroes in the lineup; especially is this true when the record is viewed as a whole.

The alleged error is harmless on still another ground. In *Harrington v. California*, 395 U. S. 250 (1969), the Supreme Court affirmed the conviction of the appellant due to the overwhelming evidence against him notwithstanding his constitutional allegations of error. In the instant case, like in *Harrington*, the evidence of guilty against the appellant is overwhelming notwithstanding the allegation that counsel for the appellant was improperly limited on his cross-examination of Marilyn Marx. Marilyn Marx clearly identified the appellant as the one who committed the crime (T. 8, 9, 22), as did Sheryl Kimball (T. 24, 25), another of the State's witnesses, whose testimony incidentally is not challenged by the appellant. Moreover, Linda Fehmal, a third State's witness, admitted being an accessory to the crime, and testified that the appellant was the perpetrator (T. 28-33).

In light of the testimony before the jury which is not challenged by the appellant, it seems clear that the evidence overwhelmingly points to appellant's guilt beyond a reasonable doubt. Thus, even though error may have been committed when counsel for appellant cross-examined Marilyn Marx, in light of other existing evidence pointing to appellant's guilt, such error is not grounds for reversing the ruling of the lower court.

### CONCLUSION

The respondent submits that the lower court did not abuse its discretion in not allowing certain questions proffered by appellant's counsel during the cross-examination of Marilyn Marx; but, if this Court finds that in fact such limitation was error, then the respondent submits that such error was harmless and thus not grounds for reversing the court below.

Respectfully submitted,

VERNON B. ROMNEY  
Attorney General

LAUREN N. BEASLEY  
Chief Assistant Attorney General  
*Attorneys for Respondent*