

IN THE DISTRICT COURT OF KEYA PAHA COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

vs.

**JOSEPH “JOE”BAUER, also known as
JOSEPH V. BAUER,**
Defendant.

Case No. 2932

**JOURNAL ENTRY
ON TRIAL**

DATE OF TRIAL: September 27-October 1, 1999.

APPEARANCES:

For plaintiff:

Avery L. Gurnsey, Keya Paha County Attorney, and Barry Waid,
Special Deputy Keya Paha County Attorney.

For defendant:

John O. Sennett and Michael Borders with defendant.

SUBJECT:

Jury Trial.

PROCEEDINGS:

On Monday, September 27, 1999, the jury trial commenced. After viewing the juror orientation video and hearing introductory comments by the court, the jury panel was duly sworn for examination. The names of 24 prospective jurors and three prospective alternate jurors were duly drawn by the clerk and voir dire examination conducted by the court.

During the court’s examination, 14 prospective jurors or replacements and 4 prospective alternate jurors or replacements were excused for cause and replacements duly drawn by the clerk and examined by the court. During such examination, the panel was duly admonished and a mid-morning recess was taken. Following the recess, the court’s examination continued. The panel was admonished and recess was taken for lunch. Following the lunch recess, the court’s examination was concluded.

Voir dire examination was then conducted by counsel for plaintiff. During the course thereof, on motion of plaintiff’s counsel and without objection, two prospective jurors were excused for cause, and replacements duly drawn by the clerk and examined by the court and counsel for plaintiff. The plaintiff passed the panel for cause.

Voir dire examination was then conducted by counsel for defendant. During the course thereof,

on motion of defendant's counsel and without objection, one prospective alternate juror was excused for cause, and a replacement duly drawn by the clerk and examined by the court and counsel for plaintiff, who passed the replacement for cause. Counsel for defendant then completed voir dire examination, and passed the panel for cause.

Peremptory challenges to the panel of 24 prospective jurors were exercised by counsel for plaintiff and counsel for defendant, and the trial jury of 12 persons was duly sworn. Counsel for plaintiff and for defendant waived further examination of the panel of three prospective alternate jurors, and counsel for plaintiff and counsel for defendant each exercised a peremptory challenge to one prospective alternate juror. The remaining alternate juror was duly sworn, and the trial jury and alternate juror were duly admonished by the court and a brief recess followed.

Following the recess, preliminary instructions were given by the court to the jury, and counsel for plaintiff presented the plaintiff's opening statement. The jury was admonished and excused for the day. In the absence of the jury, defendant verbally moved in limine regarding testimony of Katey Boley. Arguments were heard, and the motion was denied. The trial was recessed to Tuesday, September 28, 1999, at 9:00 a.m.

On Tuesday, September 28, 1999, the jury trial resumed with all counsel and the defendant present. Counsel for defendant presented the defendant's opening statement. Katey Boley was sworn and testified for plaintiff. Thereafter, the jury was admonished and excused from the courtroom. Plaintiff's counsel verbally moved for sequestration of witnesses except for Sheriff Sell. Arguments of counsel were heard. Findings were stated on the record and the motion for sequestration of witnesses other than Sheriff Sell was granted. Counsel were instructed to admonish witnesses accordingly and to monitor the courtroom for compliance. A short recess followed.

Before the jury returned, counsel for the defendant requested an announcement to the jury regarding sequestration of witnesses. Without objection, the motion was granted. The jury returned, and the defendant's requested announcement was made.

Kayla Mundorf, Linda Mundorf, and Julie Glandt were sworn and testified for plaintiff. During cross-examination of witness Glandt, the jury was admonished and excused from the courtroom. A hearing was held in the absence of jury; and offers of proof were made and ruled upon on the record. A recess

followed. Following the recess, the jury returned and the examination of witness Glandt was concluded. Gary Sell was sworn and testified for plaintiff. The jury was admonished and recess taken for lunch.

Following an extended lunch recess to accommodate proceedings had in another case, Amanda Stedman was sworn and testified for plaintiff. During direct examination, the jury was admonished and excused from the courtroom. During the absence of the jury, the court reversed its prior interlocutory order authorizing admission of evidence of prior acts by the defendant, and made findings on the record that the danger of unfair prejudice and confusion of issues before the jury substantially outweighs the probative value of such evidence during the state's case-in-chief. The court observed that the exclusion of such evidence during the state's case-in-chief may not preclude the use of such testimony during rebuttal depending upon evidence which might be introduced by defendant. A recess followed.

The jury returned and the examination of Amanda Stedman resumed. During the course thereof, the jury was admonished and a recess was taken for marking of exhibits. Following the recess, the examination resumed. During further examination, the jury was admonished and excused from the courtroom for arguments of counsel. The arguments were heard and any necessary rulings were made on the record. The jury returned and the examination was concluded. The jury was admonished and the trial was recessed until Wednesday, September 29, 1999, at 9:00 a.m.

On Wednesday, September 29, 1999, the trial resumed with all counsel and the defendant present. In the absence of the jury, at the request of counsel, a discussion was held regarding the court's ruling on prior act evidence and applicable procedures. The jury returned, and Kathy Svoboda and Marcie Heerten were sworn and testified for plaintiff.

Shirley Block and Deb Cullison were sworn and testified for plaintiff. During redirect examination of Cullison, the jury was admonished and a recess taken. Thereafter, in the absence of the jury, arguments of counsel were heard on evidentiary issues. Tentative rulings were announced, but no specific relief was granted and specific rulings were deferred until examination of applicable witnesses. The jury returned and the examination of Cullison was concluded. Cindy Uzella and Dennis Cullison were sworn and testified for plaintiff. The jury was admonished and recess was taken for lunch.

Following the lunch recess, in the absence of the jury, the defendant voluntarily waived his statutory right of sequestration of the jury during jury deliberations. The jury returned, and Joyce Lehn, Dale Reber,

and Jaccinda Babcock were sworn and testified for plaintiff. The jury was admonished and recess taken pending the arrival of a witness.

The jury returned, and Gloria Babcock was sworn and testified for plaintiff. Plaintiff moves to recess trial to 9:00 a.m. on following morning due to witness logistics. Without objection, the motion was granted and the jury was admonished and the trial was recessed until Thursday, September 30, 1999, at 9:00 a.m.

On Thursday, September 30, 1999, with all counsel and the defendant present, the trial resumed. An informal conference with counsel was held regarding the contents of a room adjacent to jury room; and the court disclosed its intention to instruct jury to disregard anything observed therein. There were no objections. The jury returned, and neither party desiring to make any record or raise any objection, the court admonished the jury to disregard anything observed in the adjacent room and that anything therein does not constitute evidence in this case. Dr. Helen Sinh Dang was then sworn and testified for plaintiff. Gary Sell was recalled, and was duly sworn and testified further for plaintiff. The plaintiff rested. The jury was admonished and excused from the courtroom.

In the absence of the jury, the defendant through counsel verbally moves for a directed verdict, stating a separate motion as to each count, for failure to adduce evidence sufficient to state a prima facie case. Arguments of counsel are heard. The court denied the motion for the reasons stated on the record. At the defendant's request, a recess was taken.

The jury returned, and Jan Bauer was sworn and testified for defendant. During cross-examination, the jury was admonished and recess was taken for lunch.

After informal consultation with counsel for plaintiff and counsel for defendant, and upon the jury's return, the court admonished the jury regarding allowed attendance at high school sporting events and appropriate cautions concerning such attendance. The examination of Jan Bauer was concluded. Floyd Bolton Jr. was sworn and testified for defendant. The jury was admonished and a recess was taken.

Following the recess, Freda May Thiede, Thomas Owens, and Marlene Sloan were sworn and testified for defendant. On the defendant's motion, the jury was admonished and recess was taken.

Following the recess, Joseph Virgil Bauer, the defendant, was sworn and testified in his own behalf. During cross-examination, the jury was admonished and excused from the courtroom. Arguments of

counsel were heard on a pending objection and rulings were made on the record. The jury returned and the examination was concluded. The defendant rested. The jury was admonished and further recess was taken.

In the jury's absence, the defendant moved in limine regarding rebuttal witnesses. Arguments of counsel were heard. The motion was denied without prejudice. The recess was resumed. In the continuing absence of jury, a hearing was held on the proposed use of rebuttal witness Nila Gierau. A potential disqualification matter with regard to Nila Gierau was disclosed by the court. The matter was resolved by a waiver of foundation and stipulation regarding Exhibit 52.

The jury returned, and the stipulation regarding Exhibit 52 was received in rebuttal. Gary Sell, having been previously sworn, was recalled and testified for plaintiff in rebuttal. The plaintiff rested on rebuttal. There was no additional evidence for the defendant. The jury was admonished and excused for the day, with instructions to return at 9:00 a.m. on Friday, October 1.

An informal instruction conference was held with all counsel. The formal instruction conference was then held on the record with all counsel and the defendant present, except that attorney Borders joined the conference shortly after the beginning. The defendant renewed the individual motions for directed verdict as to each count of the Information. Arguments of counsel were heard or waived. The motions were denied. There were no additional motions for either party. The court's proposed Instructions Nos. 1 through 8, inclusive, and the proposed verdict form, were considered. There were no objections thereto by plaintiff. There were no objections thereto by defendant, except that the defendant objected to paragraph C of Instruction 3 and to Instructions Nos. 4 and 6. Arguments of counsel were heard or waived, and the objections were overruled. The specific requests of counsel to omit further instructions on evidence for limited purpose (NJ12d Crim. 5.3, paragraph A) and voluntary statement (NJ12d Crim. 6.0) were noted for the record, and those instructions were omitted at counsel's request. There are no additional requested instructions for the plaintiff. The defendant's request No. 1 for an additional instruction on circumstantial evidence was submitted. The plaintiff objected thereto. Arguments were heard or waived. The objection was sustained, and requested instruction No. 1 was refused and the refusal endorsed thereon by the court and filed by the clerk. There were no further additional requested instructions for the defendant. Time limits of 60 minutes per side, with no longer time during rebuttal than

used for first part of closing argument, were ordered by the court without objection. The court advised the defendant of the necessity of the defendant's presence at or near the courtroom during jury deliberations. The trial was recessed until 9:00 a.m. on Friday, October 1, 1999.

On Friday, October 1, 1999, the jury trial resumed with all counsel and the defendant present. Closing arguments were presented by counsel for plaintiff and by counsel for defendant. The jury was admonished and a recess was taken. Following the recess, the jury returned and the written instructions were read by the court to the jury. The court discharged the alternate juror. The cause was submitted for commencement of deliberations at 11:16 a.m., and the jury retired to the jury room.

A question was received in writing from the jury and filed by the clerk. An informal instruction conference was held with counsel. Thereafter, a formal instruction conference was held on the record with all counsel and the defendant present. The court's proposed Instruction No. 9 was considered. There were no objections by the plaintiff or the defendant. At 1:40 p.m., the jury returns, and Instruction No. 9 was read by the court to the jury, and the cause resubmitted at 1:42 p.m.

At 7:56 p.m., with all counsel and the defendant present, the jury returned and announced that it had reached verdict. The verdict form was duly filed by the clerk, and read aloud by the clerk in open court, wherein the jury found the defendant guilty as charged on each count. Upon inquiry by the court if it was their unanimous verdict, all 12 jurors joined in an affirmative response. Further polling of the jury was waived by counsel for plaintiff and counsel for defendant. The verdict was accepted by the court and the defendant adjudged guilty as charged on each count. A presentence investigation by the probation officer was ordered, and the clerk was directed to notify the probation officer. Bond was continued, and the defendant ordered to appear and advised of the consequences for failure to appear. The jury was discharged with the thanks of the court. After a brief recess, with all counsel and the defendant present, the defendant moved for continuance of sentencing due to a schedule conflict of the defendant's attorney. Without objection, the motion was granted, and the sentencing was continued to January 14, 2000, at 1:30 p.m.

ORDER:

IT IS THEREFORE ORDERED that:

1. The defendant, Joseph Virgil Bauer, is adjudged guilty as charged of:
 - a. On Count No. 1, of First Degree Sexual Assault, a Class II felony;

- b. On Count No. 2, of Sexual Assault on a Child, a Class IV felony;
 - c. On Count No. 3, of First Degree Sexual Assault, a Class II felony;
 - d. On Count No. 4, of Sexual Assault on a Child, a Class IV felony;
 - e. On Count No. 5, of First Degree Sexual Assault, a Class II felony; and,
 - f. On Count No. 6, of Sexual Assault on a Child, a Class IV felony.
2. Presentence investigation is ordered, and the clerk is directed to notify the probation officer.
 3. Sentencing is set for January 14, 2000, at 1:30 p.m. The defendant is ordered to appear for sentencing.
 4. The jury is discharged.

Dated: October 1, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19__ by _____.
- 9 Enter judgment on the judgment record.
Done on _____, 19__ by _____.
- 9 Mail postcard/notice required by § 25-1301.01 within 3 days.
Done on _____, 19__ by _____.
- 9 (Trial docket entry made by the court manually.)

Mailed to:

BY THE COURT:

William B. Cassel
District Judge