

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

vs.

SHANE DEMPSEY,
Defendant.

Case No. CR01-7

**JOURNAL ENTRY
ON TRIAL**

DATE OF TRIAL: September 18-20, 2001.

APPEARANCES:

For plaintiff: Thomas P. Herzog, Holt County Attorney.

For defendant: Rodney J. Palmer with defendant.

SUBJECT: Jury Trial.

PROCEEDINGS:

September 18, 2001:

The juror orientation video was displayed. After 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, two prospective jurors were excused for cause and replacements duly drawn by the clerk and examined by the court. At the conclusion of the court’s examination, the panel was duly admonished and a mid-morning recess was taken. Following the recess, voir dire examination was then conducted by counsel for plaintiff. The plaintiff passed the panel for cause. Voir dire examination was then conducted by counsel for defendant. The defendant 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, consisting of:

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|------------------|-------------------|----------------------|
| Darren D. Strong | Doris J. Hubert | Alfred C. Schilousky |
| Richard N. Mohr | Terry L. Kaczor | Theresa G. Kaup |
| Rose E. Ramm | Delbert L. Ferris | Kimberly A. Fonseca |
| Diane R. Selby | Frances A. Anson | Angela A. Schaaf |

was thereby selected. Additional voir dire examination of the prospective alternate jurors was made by counsel for plaintiff and waived by counsel for defendant. Peremptory challenges were exercised by

counsel for plaintiff and counsel for defendant, and the alternate juror, Steven J. Langan, was thereby selected. The trial jury and the alternate juror were duly sworn and admonished, and excused for lunch. Recess for lunch followed.

Following the recess, preliminary instructions were given by the court to the jury. Opening statements were presented by counsel for plaintiff and counsel for defendant. Evidence was adduced for plaintiff. Leon Meyers, David Wirges, and Dale Neumiller were sworn and testified. The jury was admonished and a brief recess was taken. Jerry Irwin was sworn and testified. During direct examination, the jury was admonished and excused from the courtroom, and in the absence of the jury, a hearing was held on a discovery objection to offered exhibits. Exhibit 44 was offered and received on the court's own motion for purpose of the hearing, and admissions of counsel for defendant considered. Arguments of counsel were heard, and during argument of plaintiff's counsel, the offer was withdrawn. The jury returned, and the examination of Jerry Irwin continued. During cross examination, after instructing the jury to disregard certain comments of counsel for plaintiff, the court admonished the jury and excused the jury from the courtroom. In the absence of the jury, counsel for defendant moved for a mistrial. Arguments of counsel were heard or waived. The motion was denied for reasons stated on the record. The jury returned and the examination of Jerry Irwin resumed and was concluded. Robert Krotter was sworn and testified. During direct examination, the jury was admonished and excused for the day. The trial was recessed until Wednesday, September 19, 2001, at 9:00 a.m.

September 19, 2001:

With all counsel and the defendant present, and in the presence of the jury, the trial resumed. The examination of Robert Krotter, having been previously sworn, was resumed and concluded, subject to recall by the defendant. Fred Krotter was sworn and testified. The jury was admonished and a mid-morning recess was taken.

Following the recess, the defendant released Robert Krotter from recall. Don Clyde was sworn and testified. David Wirges was recalled and testified further. Channa Dygert was sworn and testified. The jury was admonished and excused for lunch. The trial was recessed for lunch.

Following the lunch recess, Colin Stevens was sworn and testified. The jury was admonished and a recess was taken.

In the absence of the jury, the State rested. The defendant moved for a directed verdict on all counts. Arguments of counsel were heard. During arguments on said motion, the plaintiff verbally moved to withdraw the plaintiff's rest for the sole purpose of amending the information to conform to the proof regarding the vehicle identification number in Count No. 5, and to amend the information by interlineation accordingly. Arguments of counsel were heard. The motion to withdraw rest and amend by interlineation was granted, and the amendment by interlineation was accomplished forthwith. Whereupon, the plaintiff renewed plaintiff's rest. Further arguments were heard on the defendant's motion for a directed verdict. The motion for a directed verdict was granted as to Count No. 6, and Count No. 6 was dismissed with prejudice. The motion was otherwise overruled and denied as to all other counts.

The defendant verbally moved to dismiss the information for alleged non-compliance of discovery order regarding failure to produce audio tape. Arguments of counsel were heard. The motion was denied for reasons stated on the record. The defendant again moved to dismiss the information or for alternative sanctions regarding the failure to produce audio tape. Arguments of counsel were heard sufficient to identify the subject matter of the motion as the same as the previous motion, and the motion was denied as already ruled upon. Further recess was taken.

Following the recess, and in the presence of the jury, the plaintiff formally rested. The defendant formally rested without additional evidence. The jury was admonished and excused from the courtroom.

An informal instruction conference was held in chambers. Thereafter a formal instruction conference was held in the courtroom with both counsel and the defendant present. The defendant renewed the defendant's motions for directed verdict and motions to dismiss and renewed the arguments in support thereof. The plaintiff waived additional argument. The motions were denied.

Proposed Instructions Nos. 1 through 13, inclusive, and the proposed verdict form were considered. There were no objections for plaintiff. There were no objections for defendant, except that the defendant objected to Instructions Nos. 4, 6, and the verdict form to preserve the defendant's motions and further objected to paragraph F of Instruction No. 7. Arguments of counsel were heard or waived. The objections were overruled. The defendant specifically requested that Instruction No. 12 be given. The defendant's objection to the absence of the word "recklessly" regarding Count No. 5 on the verdict form was sustained with the consent of the plaintiff, and the verdict form was modified accordingly.

The plaintiff requested an additional instruction in writing, which was duly filed by the clerk, to which the defendant objected. Arguments of counsel were heard. The objection was sustained and the requested instruction was refused, and the court endorsed the written requested instruction as “refused.” There were no other additional requested instructions for the plaintiff and no additional requested instructions for the defendant.

Pursuant to agreement of counsel, closing arguments were limited to 30 minutes per side.

The defendant, upon being informed of his right to the presence of his counsel during jury deliberations, for any jury questions, and for the receipt of the jury verdict, waived such right, and the court, after examination of the defendant, found such waiver to be made freely, voluntarily, knowingly and intelligently. The court will therefore excuse the defendant’s counsel from attendance during deliberations, further instructions in response to questions, and receipt of the verdict.

Whereupon the jury returned. The court inquired of the jury regarding the desire to recess for the day or to continue working into the evening. After some members of the jury indicated a desire to recess for the day, the jury was admonished and excused for the day, and the trial was recessed until 9:00 a.m. on Thursday, September 20, 2001.

September 20, 2001:

With all counsel and the defendant present, the jury returned and closing arguments were presented by counsel for plaintiff and counsel for defendant. The jury was admonished and excused from the courtroom. A typographical error in Instruction No. 4 regarding the vehicle identification number in Count No. 5 was corrected and the date of submission to the jury in Instruction No. 13 was corrected.

At 10:14 a.m., the jury returned, and the written instructions were read to the jury and the cause submitted at 10:50 a.m. The court discharged the alternate juror, who was excused with the thanks of the court. The court directed the bailiff to conduct the jury to the jury room to commence deliberations. After the jury exited, and in their absence, the court again inquired of the defendant regarding the waiver of presence of counsel, and the defendant renewed his waiver. The court directed counsel to determine that the proper exhibits and only the proper exhibits were delivered to the jury. The trial recessed.

A set of two written questions was received from the jury. Proposed Instruction No. 14 was prepared and copies furnished to the plaintiff’s counsel and to the defendant without counsel. The

defendant was afforded the opportunity to consult with counsel by telephone. Thereafter, a formal instruction conference was held in the courtroom with the plaintiff's attorney and the defendant without counsel personally present. There were no objections to proposed Instruction No. 14. Whereupon, the jury returned at 11:44 a.m., and the court inquired of the bailiff if all of the received exhibits had been furnished to the jury, and the bailiff replied that they had been. The court read Instruction No. 14 to the jury, and the cause was resubmitted at 11:46 a.m. The court directed the bailiff to conduct the jury to the jury room to resume deliberations.

At 1:00 p.m., in the presence of the plaintiff's attorney and the defendant without counsel, the jury returned and reported that it had reached a verdict. The signed verdict form was reviewed by the court and questions propounded by the court of the foreperson to verify the jury's intention regarding its findings of amounts. The signed verdict was duly filed by the clerk, who read the verdict aloud in open court. Upon inquiry by the court, all 12 jurors responded by show of hands that it was their unanimous verdict. The plaintiff's attorney waived further polling of the jury. The defendant waived further polling of the jury. The court accepted the verdict, and adjudges the defendant as stated below in accordance therewith. Upon inquiry by the court, the plaintiff requests that bond be continued. The defendant's custodian under bond conditions requests modification of the bond conditions. The motion was denied. The jury was discharged with the thanks of the court.

ORDER:

IT IS THEREFORE ORDERED that:

1. Pursuant to verdict, the defendant, Shane Dempsey, is adjudged guilty as charged:
 - a. On Count No. 1, of Burglary, a Class III felony;
 - b. On Count No. 3, of Criminal Mischief, a Class IV felony;
 - c. On Count No. 4, of Unauthorized Use of a Propelled Vehicle, a Class III misdemeanor;
 - d. On Count No. 5, of Criminal Mischief, a Class II misdemeanor;
 - e. On Count No. 7, of Willful Reckless Driving, a Class III misdemeanor; and,
 - f. On Count No. 8, of Failure to Report Accident, a Class IV misdemeanor.
2. Pursuant to verdict, the defendant, Shane Dempsey, is adjudged not guilty on Count No. 2, the charge of Criminal Mischief.

3. As granted on the defendant's motion for directed verdict at the close of the plaintiff's case, the defendant is adjudged not guilty on Count No. 6, the charge of No Operator's License.

4. Presentence investigation is ordered. The clerk is directed to notify the probation officer.

5. Restitution hearing is set for **Monday, November 5, 2001**, at **9:00 a.m.**, or as soon thereafter as the same may be heard.

6. Sentencing is set for **Monday, December 17, 2001**, at **9:00 a.m.**, or as soon thereafter as the same may be heard. The defendant is ordered to appear for sentencing. Bond is continued upon the same terms and conditions.

7. The jury is discharged.

Dated: September 20, 2001

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 _____.

Enter judgment on the judgment record.

Done on _____, 19____ by _____.

Mail postcard/notice required by § 25-1301.01 within 3 days.

Done on _____, 19____ by _____.

(Trial docket entry dictated.)

Mailed to:

BY THE COURT:

William B. Cassel

District Judge