

**IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA**

**THE STATE OF NEBRASKA,**  
Plaintiff,

vs.

**JOHN W. PAYOVICH,**  
Defendant.

Case No. CR01-26

**JOURNAL ENTRY ON TRIAL  
AND JUDGMENT OF  
ACQUITTAL**

**DATE OF TRIAL:** January 15-16, 2002.

**APPEARANCES:**

For plaintiff: Eric A. Scott, Cherry County Attorney.  
For defendant: W. Gerald O’Kief with defendant.

**SUBJECT:** Jury Trial.

**PROCEEDINGS:**

Tuesday, January 15, 2002:

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, of which one was tentatively excused only because of pressing personal or business concerns, and replacements duly drawn by the clerk and examined by the court. Voir dire examination was then conducted by counsel for plaintiff. The plaintiff passed the panel for cause. The panel was duly admonished and a mid-morning recess was taken. Voir dire examination was then conducted by counsel for defendant. During the defendant’s examination, the defendant moved to excuse one prospective juror for cause, and after opportunity for counsel to be heard in low tones and after further inquiry by the court, the motion was denied. 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:

[deleted] [deleted] [deleted]

was thereby selected. The trial jury was duly sworn. Additional voir dire examination of the prospective alternate jurors was waived by counsel for plaintiff and counsel for defendant. Peremptory challenges were exercised by counsel for plaintiff and counsel for defendant, and the alternate juror, [deleted], was thereby selected. The alternate juror was duly sworn. The trial jury and the alternate juror were duly admonished, and a brief recess was taken.

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. The jury was admonished and the trial was recessed for lunch. Following the lunch recess, evidence was adduced for plaintiff. Dennis Colsden was sworn and testified. During direct examination, the jury was admonished and excused from the courtroom. The redaction of Exhibit 3 was accomplished and Exhibit 3A was provided as the redacted exhibit. The jury returned and the examination of Dennis Colsden was concluded. Sara Payovich was sworn and testified. The jury was admonished and a recess was taken. After the recess, but in the absence of the jury, the State rested. The defendant moved for a directed verdict. Arguments of counsel were waived by defendant and briefly stated by plaintiff. The motion for a directed verdict was denied. The jury returned, and the plaintiff rested in the presence of the jury. Evidence was adduced for the defendant. The defendant, John W. Payovich, was sworn and testified. The defendant rested. The plaintiff rested on rebuttal without rebuttal evidence. After inquiring of the jury regarding their individual attitudes about working after 5:00 p.m., the jury was admonished and excused for the day.

An informal instruction conference was held in the courtroom off the record. Thereafter a formal instruction conference was held in the courtroom with both counsel and the defendant present. There were no motions for directed verdict.

Proposed Instructions Nos. 1 through 10, inclusive, and the proposed verdict form were considered. There were no objections for plaintiff. There were no objections for defendant, except insofar as relating to the defendant's additional requested instruction.

There were no additional requested instructions for the plaintiff. The defendant submitted defendant's requested Instruction No. 1, relating to a claim of self-defense, to which the plaintiff objected. Arguments of counsel were heard. The requested instruction was endorsed as "refused" by the court and directed to be filed by the clerk, who file-stamped and dated the refused instruction in open court.

Pursuant to agreement of counsel, closing arguments were limited to 30 minutes per side. The court advised the defendant of the requirement that he remain present on the courtroom floor of the courthouse during all jury deliberations.

The plaintiff requested a hearing regarding the qualifications of juror [deleted]. The plaintiff presented evidence as a showing of grounds to question the qualifications of such juror. Joe Kreycik was sworn and testified. There was no evidence for defendant on the matter. Arguments of counsel were heard. The court advised the parties of the court's intention to carefully inquire of the matter with the juror on the record in the presence of counsel and the defendant, and in the absence of the remainder of the jury, prior to closing arguments. The trial was recessed until Wednesday, January 16, 2002, at 9:00 a.m.

Wednesday, January 16, 2002:

With all counsel and the defendant present, but in the absence of the jury, the court again considered the matter last raised by the plaintiff on Tuesday. On the court's own motion, the clerk of the district court, Maedeane Rodgers, was sworn and testified. There was no additional evidence for the parties. Additional arguments of counsel were heard.

The juror, [deleted], was brought to the courtroom in the absence of the other jurors and without notice to the other jurors. The court posed certain questions to the juror regarding qualifications on the record with all counsel and the defendant present. The juror was excused from the courtroom to a different location than the other jurors. Further arguments of counsel were heard and considered. For reasons stated on the record, the juror in question was discharged and the alternate juror appointed in replacement thereof. The court thanked the discharged juror for his service, and excused the juror from further attendance. The discharged juror departed without further contact with the remaining jurors.

The defendant was allowed a brief recess to consult with counsel.

The jury returned, and the alternate juror was officially notified of his replacement of one of the jurors, and closing arguments were presented by counsel for plaintiff and counsel for defendant. The written instructions were read to the jury and the cause submitted at 10:05 a.m. The court directed the bailiff to conduct the jury to the jury room to commence deliberations. The trial was recessed.

At 1:15 p.m., with both counsel and the defendant present, the jury returned and reported that it had reached a verdict. The signed verdict form was reviewed by the court. The signed verdict was duly

filed by the clerk, who read the verdict aloud in open court, wherein the jury found the defendant not guilty. Upon inquiry by the court, all 12 jurors responded by show of hands that it was their unanimous verdict. Counsel for plaintiff and counsel for defendant waived further polling of the jury. The court accepted the verdict, and adjudges the defendant as stated below in accordance therewith. The jury was discharged with the thanks of the court.

**ORDER:** IT IS THEREFORE ORDERED that:

1. Pursuant to verdict, the defendant, John W. Payovich, is adjudged not guilty of Terroristic Threats.
2. The defendant is discharged forthwith.
3. The defendant's bond is released and discharged and any surety thereon exonerated, and the clerk is directed to refund the bond deposit less any required statutory fee to the defendant or his assignee, as their interests may appear.
4. The jury is discharged.

Dated: January 16, 2002.

If checked, the Court Clerk shall:

☐ Mail a copy of this order to all counsel of record and to any pro se parties.

9 Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_.

9 Enter judgment on the judgment record.

9 Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_.

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

9 Done on \_\_\_\_\_, 19\_\_\_\_ by \_\_\_\_.

9 (Trial docket entry dictated.)

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge