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STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF WATONWAN

FIFTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

File: K6-93-234

Herbert Cecil Saunders,

Defendant.

\* \* \* \* \*

TRANSCRIPT ON APPEAL

\* \* \* \* \*

The above-entitled matter came on for hearing before the Honorable Terence M. Dempsey, Judge of District Court, on this 10th day of March, 1995 at the District Courtroom, Watonwan County Courthouse, St. James, Minnesota, and reported by Ms. Lisa M. Vosika, a Notary Public in and for the County of Brown, State of Minnesota, commencing at approximately 8:30 a.m.

The defendant appeared in person and through his attorneys, Mr. Calvin P. Johnson, Mankato, Minnesota and Ms. Diane M. Miller, Stillwater, Minnesota; and the State appeared through the Assistant County Attorney, Mr. Todd L. Kosovich, and at said time and place the following proceedings were had:

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I N D E X

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1 (WHEREUPON, the following proceedings were  
2 held in chambers.)

3 THE COURT: The -- ah -- record should  
4 indicate it's now about quarter a 12 or two minutes to 12  
5 and we're in chambers. The jurors are still -- ah --  
6 deliberating. We're been contacted by them once this  
7 morning indicating that they have deadlocked. They see  
8 no possibility of resolving the issue, that was a couple  
9 hours ago. We've had no further communications.

10 My purpose in -- ah -- going into chambers at this  
11 time is to hear from counsel from the County and the  
12 State and the Defendant and then to express my concerns  
13 as to whether this jury is deadlocked and would have to  
14 be retried or whatever, but in any case, is it considered  
15 to be a hung jury at this point. We'll start with Mr.  
16 Kosovich.

17 MR. KOSOVICH: Your Honor, I believe in my  
18 experience with this type of thing, limited though it may  
19 be, that this is something that's purely in the Court's  
20 discretion. And the place of the attorneys is to merely  
21 advise or suggest.

22 As I understand the Court intends to require of the  
23 jury whether or not they are deadlocked and the Court  
24 will make whatever decision it feels is appropriate at  
25 this time. In my experience I believe this is an

1 appropriate way to approach the matter. We have already  
2 discussed the possibility of reinstructing the jury as  
3 the question and it was decided that the instructions as  
4 they have been will stand and that is fine.

5 I don't believe any further instruction is needed or  
6 necessary. And as I said this is a matter for the  
7 Court's decision. Certainly, the State of Minnesota in  
8 the County of Watonwan wants a decision on this case one  
9 way or another. This is the case that's been part of our  
10 lives for many years and I believe that both Mr.  
11 Saunders, the defense team and myself would like to see a  
12 decision. But if we don't get it from this jury, as sad  
13 as that is, I bow to the Court's wisdom and thinking that  
14 this might be a time to call it to an end.

15 THE COURT: In response to that I haven't  
16 decided. I just want to tell the jurors what's going on.

17 MR. KOSOVICH: I guess that's what I  
18 mean. If this is the inquiry that the Court wishes to  
19 make I have certainly have no objection to the Court's  
20 decision.

21 THE COURT: Okay.

22 MR. KOSOVICH: It's in the Court's  
23 discretion. I just hope we get an answer that will  
24 surprise us and they will want to continue.

25 THE COURT: All right. Miss Miller.

1 MS. MILLER: Um -- since we haven't heard  
2 from the jury, I think it's appropriate to continue to  
3 let them go until we hear from them again. I strongly  
4 object to interfering at this particular point in time.  
5 We worked a long time on the trial to be proactive in  
6 asking them how they're doing seems not okay.

7 I -- I think we all want a result one way or the  
8 other rather than a mistrial. My client here does not  
9 want to go through another trial in this case. He's had  
10 this hanging over his head for two years now. He also --  
11 um -- is requesting the presence of Calvin Johnson, the  
12 head attorney on this case, before any movement towards  
13 the jury happens, before any contact with them or any  
14 instruction happens with them or any calling them in. I  
15 think it would be best that he would be here but also  
16 Herb's requesting that he be here.

17 I don't think there's any real need for proactive --  
18 ah -- contact with jury. I think we would really like to  
19 see them go for a little longer to see what they come up  
20 with, and since Calvin can be here by 1 or 1:30 I think  
21 by that time they're going to know if they want -- I mean  
22 they're not going to sit in there all day with no contact  
23 for us. And they gave us a preliminary vote from their  
24 overnight thing, and they're now having that opportunity  
25 one more time. And I'm just wanting not to disturb that

1 proactively.

2 MR. KOSOVICH: May I say something?

3 THE COURT: Sure.

4 MR. KOSOVICH: I don't believe it is a  
5 matter of disturbing or not disturbing. I believe we've  
6 reached a point where a logical inquiry as to their  
7 progress should be made by the simple fact that we're  
8 approaching the noon hour. And that itself could inspire  
9 the jury to say something or not. So I think that were  
10 this an hour ago this argument would be more sound but  
11 it's approaching the noon hour. I guess I simply bow to  
12 the Court's discretion and in my experience it's an  
13 appropriate inquiry for the Court to make.

14 MS. MILLER: Um -- I really want to state  
15 clearly that Mr. Herb Saunders wants Cal Johnson present  
16 before this decision is made.

17 THE COURT: Well, I think the decision  
18 rests with the Court and I have no problem with that.  
19 And I want the record to indicate that Calvin Johnson is  
20 not here this morning and the Court was not aware of his  
21 inability to be here because it was his choice and  
22 obviously we've been proceeding without him. But it was  
23 not possible to tell the jury not to deliberate and there  
24 were other matters that were more pressing than his being  
25 here.

1           Secondly, I am going to call the jury back and  
2           inquire as to how they're doing. I may release them over  
3           the noon hour and see if that will help. But I'm going  
4           to reject any attempt to tell me that I can't bring them  
5           back and find out how they're doing. I think that is  
6           entirely appropriate and in my discretion.

7           This issue is a gross misdemeanor, it's a very  
8           narrow issue. These jurors have worked very long and  
9           been in this process for a long time. And if we we're  
10          making no progress, that was the last report we got,  
11          "We're hung, we aren't going anywhere." And I told them  
12          based on the information I received from the two of you,  
13          go back and continue.

14          They're probably afraid to make any further  
15          communication back because I told them that they weren't  
16          supposed to do anything more. So I believe at this time  
17          the only thing I can do is inquire of them because they  
18          have certain -- they have certain rights as just human  
19          beings and they've been cooped up in that small room,  
20          they need to know that we're still concerned about them,  
21          we're not out having a good time.

22          But I'm going to call them back and I'm going to ask  
23          them how they're doing. And I'm going to ask them to go  
24          out to lunch and be back here at 1:00. And if they want  
25          to continue with that deliberation at that time they

1 can. But if they can't, they're hooked or deadlocked  
2 I'll come back and talk to them at that point. If Mr.  
3 Johnson is here that's fine, if he's not that's okay,  
4 too.

5 But I'm not going to continue this effort if it's a  
6 gesture in fertility, because wanting it doesn't make it  
7 so. Wanting it doesn't make a decision. It isn't going  
8 to make them make a decision if they can't. And that's  
9 what I've got to find out.

10 We could wish they would make a decision, we all  
11 wish they would make it but if it isn't possible let's  
12 face that reality and get on with it and we can decide  
13 one way or the other what happens after that. But just  
14 saying I hope they will make a decision and coercing them  
15 by confinement is not a good way to have them do it.  
16 These jurors have taken their responsibility very  
17 seriously. And I don't think I want to be part of any  
18 process that's forcing them to make a decision that they  
19 don't believe is justifiable and I think that's where  
20 they are sitting.

21 So I'm going to call the jurors back in and explain  
22 that to them and have them come back at 1:00, okay.

23 MR. KOSOVICH: Yes, Your Honor.

24 (WHEREUPON, the jury returned to the  
25 courtroom for the Court's inquiry as to their



1 deliberations.)

2 THE COURT: The record should indicate  
3 we're in open court about a quarter to 12. The jurors  
4 are here and counsel and the defendant are also present.  
5 Ladies and gentlemen, I understand you are still  
6 deliberating and at this point you still have not been  
7 able to resolve this issue by coming to a unanimous  
8 conclusion.

9 I have also received from you a notification that  
10 you think you are in fact -- ah -- what we would call a  
11 hung jury; that is, it doesn't appear that you're able to  
12 come to a conclusion that would be unanimously accepted  
13 by all the parties.

14 I appreciate that and I -- I don't want you to think  
15 that our failure to communicate with you any more than we  
16 have is any indication that you've been ignored. It is  
17 our sincere hope, and that's the hope of myself as well  
18 as the attorneys on both sides of the case, that you  
19 could resolve those differences.

20 I am not ready to give up on the process at this  
21 time. I'm going to ask that you go out to lunch, come  
22 back one more time, and give it one more try. And if you  
23 are able to resolve the differences by that time we'll  
24 all be happy. If not, I may inquire as to what your  
25 progress is to see how things are going.

1           So what I'm going to do is ask them that you --  
2           bailiffs will you make arrangements for them to go  
3           somewhere? Have those arrangement been made?

4           THE CLERK: They have not been made.

5           THE COURT: How long will that take?

6           THE CLERK: Not too long.

7           THE COURT: Could we come back at 1:15,  
8           will that be enough time for the lunch? And you can come  
9           back at 1:15 and I ask that you continue your  
10          deliberations at that time. And -- ah -- you can apprise  
11          us then as to what progress you're making.

12          I'm saying this to you in the sincere hope that you  
13          try and resolve the differences that you have. At the  
14          same time I'm not asking you to comprise your rights that  
15          you have as jurors to be a person of your own  
16          conviction. But you understand the process is best  
17          served by a decision. But if a decision is not possible  
18          I understand.

19          But it is the sincere wish of everybody involved in  
20          this that we can bring this matter to a closure, and that  
21          doesn't mean I'm trying to tell you which decision you're  
22          going to make. It's just that you should work in the  
23          past as you have continued to work in the past and bring  
24          this matter to a closure. I would ask that you be back  
25          about 1:15 to reconvene and if do want further

1 communication as in the past you can just send me a  
2 little note and I'll send a little note back to you.  
3 Okay. And we'll stand in recess until we hear from you.

4 (WHEREUPON, the court is in recess until  
5 further notification from the jury.)

6 (WHEREUPON, at approximately 1:55 p.m.,  
7 the jury returned to the courtroom.)

8 THE COURT: Good afternoon, ladies and  
9 gentlemen. The bailiffs have contacted me and indicated  
10 that they were to inform me that at this particular time  
11 it doesn't appear that the jurors will be able to agree  
12 on a unanimous verdict in this case. And I would just  
13 like to find out and on the record, this is being  
14 recorded, has one of your persons been selected as a  
15 foreperson in this case?

16 FOREPERSON: Pardon?

17 THE COURT: Have you been elected as  
18 foreperson?

19 FOREPERSON: Yes, I am.

20 THE COURT: It is the consensus of the six  
21 of you that the possibility of further negotiations would  
22 not result in a unanimous verdict? Am I correct in that  
23 assumption?

24 THE FOREPERSON: That is the consensus  
25 that we came to, yes.

1 THE COURT: And you have worked very  
2 diligently and very hard and I thank you for that. Is  
3 there anyone on the jury panel at this point, and I'm not  
4 interested in whose position is what, anyone on the jury  
5 panel that feels that further negotiations would result  
6 in a unanimous verdict, either for acquittal or  
7 conviction? Does anybody indicate that?

8 THE JURY: (Indicating).

9 THE COURT: It is unanimous that you all  
10 feel that the jury panel is divided, all right. Based  
11 upon that is there any questions that counsel has for me  
12 or the jury or anything you want to put to the jurors at  
13 this time?

14 MR. KOSOVICH: None for the State, Your  
15 Honor.

16 MR. JOHNSON: No.

17 MS. MILLER: No.

18 THE COURT: Based upon the fact that the  
19 jury is unable to agree at this time, the Court is going  
20 to declare a mistrial. And what that means is that this  
21 matter is concluded. And I want to express on my behalf  
22 and I'm sure everyone here are thankful for what you've  
23 done.

24 There's nothing to be regretful about the fact that  
25 you haven't come to conclusion that's not the point.

1 You've done exactly what you were told to do and that is  
2 to work as jurors as diligently as you can to come to a  
3 conclusion but at the same time not sacrifice your own  
4 personal conviction for the sake of a unanimous verdict.

5 You have done your work, and you probably have  
6 served longer as jurors than most of the people who have  
7 served as jurors in Watonwan County for the last ten  
8 years. I'm not sure there's many cases that have lasted  
9 longer than that.

10 Further, I want to indicate to you that you will be  
11 discharged from jury service at this time. You are free  
12 to discuss this among yourselves or among anyone else.  
13 There may be persons who ask you questions about what the  
14 jury deliberations were, what happened, why this  
15 occurred, you are free to respond to those people if you  
16 wish but let me also advise you, you don't have to speak  
17 to anyone about this. If you don't care to discuss it  
18 you say I'm sorry I don't want to discuss it. No one can  
19 require you to respond to any questions and because of,  
20 you know, this result there may very well be questions.  
21 And if you don't care to make any discussions with third  
22 persons that's fine, you're not obliged to do so.

23 And if anyone does cause you a problem of that  
24 respect please advise me and they will be dealt with  
25 accordingly.

1           But as of this moment this case has been concluded.  
2           Again thank you very, very much for your service and  
3           assistance. It's been outstanding and we're proud of the  
4           work that you've done for us.

5           I hesitate to say this but it is entirely possible  
6           that there will be further jury cases tried in Watonwan  
7           County. If that were to occur your name is still on the  
8           jury panel and you would be subject to be recalled as  
9           jurors. But at the same time you may not be selected. I  
10          don't want you to walk around with this cloud of gloom  
11          hanging over your head, something that's going to ruin  
12          the rest of your life.

13          But I just want to indicate that because you served  
14          on a jury doesn't mean you're through.

15                   THE CLERK: They've served ten days.

16                   THE COURT: Have they've served ten days?

17                   MR. KOSOVICH: Oh, yeah.

18                   THE COURT: You're excused then you don't  
19          have to come back. They do have their ten days in,  
20          right?

21                   THE CLERK: Yes.

22                   THE COURT: The cloud of gloom has been  
23          removed. Again, thank you very much. This is a nice day  
24          go home and enjoy the rest of it. And, again, we want to  
25          thank you very much for your service. That's all, you're

1       excused.

2                       (WHEREUPON, the jurors were excused after  
3 a hung jury was declared.)

4                       THE COURT: I'm not here to -- ah --  
5 lecture counsel, I just want to thank all of you for your  
6 participation in this process. These things happen so  
7 this case is now closed. There's nothing further that  
8 will be done in this matter.

9                       It is -- ah -- part of the process that this  
10 sometimes occurs so we will be in a position now of  
11 calling this the conclusion of the proceedings. If there  
12 are further proceedings in that regard that's something  
13 that the decision will rest with the attorneys involved.  
14 Is there anything further that either counsel wants to  
15 bring my attention to at this time?

16                      MS. MILLER: No, Your Honor.

17                      MR. JOHNSON: No, Your Honor.

18                      MR. KOSOVICH: No, Your Honor.

19                      THE COURT: We're adjourned.

20                      (WHEREUPON, at approximately 2:05 p.m.,  
21 the proceedings were duly concluded.)

22                      \* \* \* END OF RECORD \* \* \*

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STATE OF MINNESOTA )

) SS:

COUNTY OF BROWN )

CERTIFICATE

I, Lisa M. Vosika, Court Reporter, do hereby certify that the foregoing pages, 272-286, inclusive, are a true and correct transcript of my stenographic notes transcribed from electronically recorded testimony.

Dated this 24th day of June, 1995.

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Lisa M. Vosika

Notary Public