IN THE SUPREME COURT OF IOWA

No. 20-0786

JAMES FARNSWORTH II,

Appellant,

v.

STATE OF IOWA,

Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CERRO GORDO COUNTY
HONORABLE CHRIS FOY, JUDGE

APPELLANT'S FINAL BRIEF

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CERTIFICATE OF SERVICE

On April 5, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon the Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to:

James Farnsworth #6184567
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/s/ Philip B. Mears
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ROUTING STATEMENT

There is no reason under Rule 6.1101(2) for the Iowa Supreme Court to retain jurisdiction in this case. The claim involves the application of existing legal principles to Farnsworth's case.

STATEMENT OF THE CASE

Nature of the Case:

This appeal is from the denial of postconviction relief regarding James Farnsworth's conviction for Second Degree Murder from Cerro Gordo County. Judge Chris Foy denied the Application on April 24, 2020. App. 32. On May 22, 2020 he denied the Motion to Amend the Findings. App. 62.

Farnsworth appealed. App. 64.

Course of Proceeding in criminal case:

James Farnsworth was arrested on April 15, 2012 and charged with First Degree Murder.

Here is the timeline:

4/16/2012 Initial Appearance- Bond was set at $100,000 cash.

4/27/2012 After a bond hearing, requested by his lawyer, the bond was doubled to $200,000 cash with $50,000 in Defendant's name. App. 8.

5/16/2012 Farnsworth was released.

1/14/2013 Trial begins.

1/22/2013 Farnsworth acquitted of First Degree; found guilty of Second Degree Murder.

3/8/2013 Farnsworth was sentenced to the mandatory 50 year sentence with 70% minimum and assessed the mandatory $150,000 restitution. App. 11.

3/14/2013 Notice of Appeal filed.

5/30/2014 Court of Appeals argument

6/25/2014 State v Farnsworth, 2014 WL2884732 (Iowa App. 2014)

8/27/2014 Application for further review denied.

On September 23, 2014 David Roth, Farnsworth's lawyer both at trial and on appeal, committed suicide.

Course of Proceeding in postconviction:

The Application for postconviction relief was filed on November 30, 2015. App. 15. The hearing was held on August 29, 2019.

On April 24, 2020, Judge Chris Foy denied the application. App. 32. Farnsworth filed a timely Motion to Amend or Enlarge the findings. App. 45. Judge Foy denied that motion. App. 62.

Farnsworth appealed. App. 64.

Judge Foy's Ruling

Judge Chris Foy denied the application. App. 32. Judge Foy acknowledged that Roth "had engaged in a pattern of fraudulent and unethical conduct over a period of years and had misappropriated millions of dollars from clients, the law firm and others." Ruling pg. 2. App. 33.

Judge Foy found that Farnsworth failed to show either a breach of duty or prejudice as to any of the claims. Judge Foy characterized the application as "built around the fact that Roth was found out to be an extremely unethical attorney."

Judge Foy made no findings with regard to many of the individual claims of misconduct. Farnsworth asked for specific findings in this Motion to amend or enlarge the findings. App. 45. Judge Foy denied the Motion. App. 62.

Additional comments about procedural matters

Bond

The handling of the bond is a claim of Ineffective Counsel that appears in argument IV. The bond was originally set at $100,000 cash. For a first degree murder case, this was not unreasonable. Nevertheless, Roth filed for a review. The bond was doubled. $50,000 of the $200,000 had to be posted in Farnsworth's name. This was a clear effort to establish a restitution fund, where the funds could be condemned.

Pretrial Motions:

The only pretrial Motions filed by the defense were one Motion to Continue and a short Motion in Limine. There was no Motion to Suppress.

On appeal, Roth argued that the State improperly commented on Farnsworth's post-Miranda silence. The Court of Appeals found the claim not preserved. 2014 WL2884732*3 (Iowa App. 2014).

Motions in Limine:

After the State's Motion in Limine, David Roth had a response. His actual Motion however was never filed. It was considered by the Court as shown in the Ruling on January 2, 2013. App. 9. See also Transcript from hearing on limine Motions dated December 27, 2013 at page 2; lines 4-13; Exhibit 5. Roth sought to exclude all evidence about the evening's events at the bar where Farnsworth slapped Miller. Transcript from proceedings, dated December 27, 2013 at page 5; lines 22-25 to page 6 lines 1-4; Exhibit 5.

There was certainly a legal dispute about whether that "slap at the bar" was going to be legally sufficient to deny the justification defense. The State argued that Farnsworth could not claim "justification" as he had "started the incident which resulted in injury or death." Limine Tr. p. 6-7, lines 6-25, 1-23.

It was frivolous for Roth to argue that the Court exclude evidence about the slap entirely. The judge denied the Defendant's Motion on January 2, 2013. App. 9.

Jury Instructions:

The State submitted a set of Jury Instruction. PCR Exhibit 10. Roth submitted no proposed instructions.

The State did not submit a proposed instruction regarding the lack of unanimity with regard to the justification alternatives. This did not stop the

prosecutor from telling the jury what the law was on that point in closing arguments. See brief at page 59.

Roth complained about Instruction 24 but offered no alternative. On appeal his complaint about who legally started the confrontation had to be presented by arguing that the prosecutor committed misconduct when she argued that the slap started the fatal contact.

This argument was rejected by the Court of Appeals as unpreserved. 2014 WL2884732*3 (Iowa App. 2014)

Closing Arguments:

Closing arguments are discussed elsewhere in this brief. There is the complaint that Roth failed to mention the standard of proof. See brief at page 55. There is the discussion about the significance of the angle of the chest wound. This is discussed at page 40 of the brief. There is reference to the prosecutor's explanation to the jury about jury unanimity. See Brief at Pg. 59.

DIRECT APPEAL

Here is the timeline for the direct appeal, handled by David Roth.

3/14/2013 Notice of Appeal

3/21/2013 The filed Combined Certificate stated that the appeal was from a Guilty Plea and Sentencing, rather than from a murder jury trial. Exhibit 21. App. 122. The initial brief was due 25 days after the filing of the transcripts.

5/28/2013 Default Notice entered against Roth failed to file Brief.

6/3/2013 Roth files the Page Proof Brief.

6/10/2013 Roth pays the penalty.

8/28/2013. The State's brief was filed after two 30 day extensions. Roth's Appendix and any Reply brief were due on September 18, 2013.

9/16/2013 Roth asks for and was given an additional 7 days to file the Reply Brief and Appendix.

10/4/2013 Eleven days past the deadline, Roth files the Appendix and a Proof Reply Brief. The Final Reply brief was due no later than 21 days after the Appendix was filed.

2/6/2014 Supreme Court tells Roth to file Final Reply Brief within ten days, to be considered.

2/12/2014 Final Reply Brief filed

STATEMENT OF FACTS

FACTUAL DISCUSSION ABOUT CRIMINAL CASE

The facts presented in the criminal case are obviously important. They are important in analyzing what mistakes were made. They are important in determining whether mistakes caused prejudice.

Condensed version of the facts

The following facts are the essential facts:

1. On April 13, 2012, James Farnsworth, aged 22, went to dinner with his girlfriend, Victoria Miller. They went to a party at a friend's apartment. The friend was Echo Dority. The entire group then went to a nearby bar.

2. Miller received a smiley face text from her ex-boyfriend, Ian Decker. He was the father of her child.

3. Farnsworth saw the text, had an argument with Miller, and slapped Miller.

4. Miller said she was done with Farnsworth.

5. Without Farnsworth, Miller and friends walked back to the apartment.

6. Farnsworth followed. Along the way, Echo Dority kicked him in the crotch. Farnsworth left in his car.

7. Ian Decker arrived.

8. Farnsworth returns and Decker tells him to leave. He leaves.

9. Farnsworth tried to call Miller. She would not talk to him.

10. Farnsworth returned again. While Farnsworth was trying to talk to Miller, Decker ran at Farnsworth.

11. Decker threw the first punch, hitting Farnsworth in the face, knocking him down. The fight did not last long.

12. There was significant evidence that Farnsworth was on the ground. Decker was above him. Farnsworth had a pocket knife. He thrust it at Decker several times, fatally injuring Decker with a wound in the chest.

13. Farnsworth left. He was located in the HyVee parking lot. He was taken into custody and then taken to a local hospital for possible injuries. He talked to the police at several points.

More detailed facts

The State presented 11 witnesses. Four were civilian witnesses who witnessed the fight when Decker attacked Farnsworth and Farnsworth stabbed him in response.

The State presented five police officer witnesses. One of those witnesses, Officer Dustin Buck, was the officer who apprehended Farnsworth at the Hyvee.

The State presented two medical doctors including Dr. Julia Goodin, the state Medical Examiner who performed the autopsy.

The Defense offered only one short witness, Victoria Miller. She testified about one statement to police not long after the fight.

Summary of State Civilian Witnesses Testimony

Echo Dority

The party was at Dority's apartment. They went to a bar. Farnsworth slapped Miller. Dority called Decker, telling him what had happened and asking him to come over. (Crim. Tr. 210, lines 12-15). During that walk back to the apartment, she encountered Farnsworth and kicked him. (Crim. Tr. pg. 215, lines 8-10)

At the apartment, she and Miller went outside to wait for Decker. After he arrived, Farnsworth also arrived. Decker told Farnsworth to leave. He left. (Crim. Tr. 219, lines 10-11).

Then he came back. This time Miller said she would go talk to him. At that point, she went around the building to do just that.

Dority described Decker as getting angrier. He took off his coat. He then ran around the corner at Farnsworth. Crim. Tr. p. 224, lines 4-5.

On cross, she said she tried to hold Decker back. But he was going to fight Farnsworth. Decker was the aggressor and Farnsworth was not intimidating anyone. Crim. Tr. p. 224, lines 4-5.

Victoria Miller

Victoria Miller was Farnsworth's girlfriend. She dated Farnsworth for several months. She had a small child with Decker.

At the bar she got a smiley face text from Decker. Farnsworth got upset. Farnsworth stormed off. Crim. Tr. p. 274, lines 7-11. She went to talk with Farnsworth. He slapped her. She told him they were done. Crim. Tr. p.279-280, lines 6-25, 1-8.

The group, without Farnsworth walked home. On arrival at the apartment, Farnsworth was there, outside, on the street. She called her dad and said to put

Farnsworth's stuff on the street. Farnsworth, saying he was going to kill himself, walked away. Crim. Tr. p.282-284, lines 1-8, 25, 1-7.

She and Dority went outside. Decker arrived. The three of them were talking when Farnsworth returned. Decker told Farnsworth to leave and he did. Crim. Tr. p. 291-292, lines 5-25, 1-5.

The party ended. Alyssa Fullerton and Derek Wentworth were getting in their car. Crim. Tr. p. 293, lines 18-20. Farnsworth returned. Miller went to talk to him. The two of them were around some corner. They could not see Dority and Decker.

Fullerton was in her car. Wentworth was yelling at Farnsworth. Miller testified that Farnsworth said that if Decker started anything, "I am going to fucking stab him." Crim. Tr. p. 294, line 21-22.

At that point, Decker came running up behind Miller and shoved Farnsworth backwards. They fought. Farnsworth was on his back. Decker was over him. Crim. Tr. p. 296, lines 13-19. They were both throwing punches.

Alyssa Fullerton

Alyssa Fullerton, with her boyfriend Derek Wentworth, all went to the bar. After the slapping incident Fullerton phoned Decker. He was worried about Miller. She told him to stay home. (Crim. Tr. p. 339, lines 1-10)

They went back to Dority's apartment without Farnsworth. When she was leaving with Wentworth, Decker showed up. (Crim. Tr. p. 343, lines 18-20). She and Wentworth had reached the car when Farnsworth arrived. Wentworth walked across the street where Farnsworth was. Miller came around the corner and started talking with Farnsworth. Crim. Tr. p. 345-346, lines 22-26, 1-23.

Decker came around the corner. Dority tried to stop him. He was running. He went right for Farnsworth and started fighting. Farnsworth was on his knees. Decker was punching him in the face. Both got up and someone yelled "He had a knife". Crim. Tr. 346-347, lines 24-26, 1-13.

On cross, she acknowledged the obvious. Decker started the physical altercation. Farnsworth had just been talking to Miller when the fight began. (Crim. Tr. p. 371, lines 15-18).

Derek Wentworth

Derek Wentworth lived Fullerton. He went to the party. Crim. Tr. p. 399, lines 4-9. He went to the bar where Farnsworth slapped Miller. He had told Farnsworth he was a "piece of shit." Crim. Tr. p. 402, lines 17-20.

They went back to Dority's. Later he was leaving with Fullerton.

Dority and Miller were outside. Miller was on the phone with Farnsworth. As he reached the car he saw Farnsworth.

Wentworth went over to talk to Farnsworth, telling him to leave. He and Farnsworth and Miller were all talking together. He did not hear any comment from Farnsworth about having a knife. Crim. Tr. p.427, lines 15-19.

Decker came up. They started fighting. Crim. Tr. p. 413, lines 6-7. Decker threw the first punch. He saw Decker over top of Farnsworth, striking him. Crim. Tr. p. 429, lines 4-16 He hit Farnsworth 1-2 times, in the face. Crim. Tr. p.413, lines 8-15. On cross, he said he was close enough that he could talk to Farnsworth in a normal tone. (Crim. Tr. p. 426, lines 17-19). He did not hear the comment about Farnsworth possibly using a knife.

Police officer testimony

Five police officers testified for the State.

The one witness of importance was Officer Dustin Buck. He had contacted and then arrested Farnsworth. He testified about what Farnsworth told him.

Medical testimony

Two doctors testified for the State.

Dr. Madden-Le Duc worked the emergency room that night. She treated Farnsworth. Crim. Tr. p. 469-470, lines 19-25, 1-4. He had injuries to his nose along with abrasions on his shoulder and knees. Crim. Tr. p. 471, lines 16-21. She conducted a neurological exam, ruling out a head injury. No one told her about any injury to the back of his head.

The State Medical Examiner, Dr. Julia Goodin, testified. She did the autopsy. Her testimony is discussed in Issue I regarding Roth not having his own expert. It is also discussed in Issue IV, at page 73.

The chest wound was the fatal wound. There was a cutting wound on the left forearm. There was the stab wound to the thigh.

With David Roth's assistance, she testified that the fatal wound was "slightly downward." Crim. Tr. p. 492, lines 1-3.

James Farnsworth side of the story

James Farnsworth did not testify. His side of the confrontation came in through Officer Buck. He talked with Buck at the HyVee parking lot and then at the station.

Here is what Farnsworth said according to Buck's testimony at trial.

> "He ran at me because I am dating his ex-girlfriend,... He ran at me and punched me four or five times. My right hand was in my pocket and that is where my knife was. I pulled it out and flung it around. That is when he fell down." Crim. Tr. p. 444, lines 11-16.

Farnsworth's Knowledge of Decker's violent nature

Farnsworth told Buck that when Decker ran at him he was "fucking scared." Crim. Tr. p. 454, lines 7-9. Farnsworth knew something of Decker's violent nature.

Farnsworth knew Decker had studied Taekwondo. Crim. Tr. pg. 213-14, lines 21-25, 1. Miller told Farnsworth that Decker had beaten someone in a case of road rage. Crim. Tr. p. 277, lines 11-15.

FACTS FROM POSTCONVICTION

Much of the evidence at the hearing was about David Roth. Evidence was presented regarding his financial misdeeds, along with his very real lack of experience dealing with serious felony cases.

Judge Foy summarized the evidence with regard to his financial misdeeds.

> Roth committed suicide on September 23, 2014, about two weeks after his partners at Gallagher-Langlas & Gallagher first learned of irregularities in the way Roth had been handling the finances of the law firm. After Roth died, it was discovered that he had engaged in a pattern of fraudulent and unethical conduct over a period of years and had misappropriated millions of dollars from clients, the law firm, and others. Ruling pg. 2, App. 33.

Judge Foy did not see the relevancy of this evidence. He never made findings about the lack of experience.

This evidence was importation. Once you understand Roth's misconduct and his lack of experience with serious criminal trials, you can better understand his representation of Farnsworth. Roth's actions were not the result of "strategy." Instead, Roth was a person in over his head, who just played out the case to avoid anyone asking for an accounting of the $90,000 he had received.

Witnesses from the postconviction hearing

Farnsworth called four witnesses.

The first was Angela Barnard, the sister of the applicant, James Farnsworth.[1] She was the family member who primarily talked about the case with Roth.

After Roth's death, she obtained the entire file from Roth's office. There were a number of things learned at that point. They did not know about a possible conflict of interest with the City of Mason City. They did not know there had been a plea offer. They did not know about the payment to the landscape company. They had never seen most of the bills.

Jessica Moothart was Roth's support person from 2008 to 2014. She answered the phones, transcribed, filed, kept the calendar, and dealt with his bills. After Roth's death, she gave Barnard a copy of the entire file, including all the invoices that had never been mailed out. (PCR Tr. p. 54, lines 8-19).

Tim Boller, a partner in Roth's firm, testified. He described Roth's misdeeds and how they were discovered. His practice included defense work for various municipalities through an insurance company (PCR Tr. p. 80, lines 7-12). That included some police departments.

[1] The Applicant, James Farnsworth, is actually James Farnsworth II. His father was James Farnsworth.

The final witness was James Farnsworth. He was only 22 when he was arrested. His prior record was a fifth degree mischief charge. He testified about various claims in the Application.

PCR Evidence from Dr. Brad Randall

For the post-conviction, Farnsworth hired an experienced pathologist, Dr. Brad Randall. He reviewed the Decker autopsy and certain trial testimony. He provided a Report. Ex. 87. App. 354. This evidence was critical, as it showed how an expert could have helped. His report addressed several forensic issues that should have been developed.

The State chose not to present any expert testimony and did not cross examine Dr. Randall's report.

Roth was a Dishonest and Unethical Lawyer

David Roth has to have been one of the more dishonest lawyers in Iowa's legal history. For years, he was the managing partner at a respected firm in Waterloo. He gave the impression of being a successful lawyer. In September, 2014, David Roth's dishonesty caught up with him.

The circumstances surrounding his last ten days of life were described by his partner, Tim Boller. PCR Tr. p. 71- 75. Roth had set up secret accounts. The bank statements would only go to him. PCR Tr. p. 88-89, lines 3-25, 1-9. A partner

received a bank statement by mistake. When confronted, Roth admitted forging a partner's name on bank documents allowing him to obtain $400,000. He was going to self-report and leave the firm PCRTr. p. 72, lines 9-21, p. 73, line 20, p. 74, lines 9-11.

In the middle of a jury trial in federal court, Roth hung himself. PCR Tr. p. 75-76, lines 24-25, 1-3.

Following his death, numerous claims of misdeeds appeared, amounting to millions of dollars.

Exhibits regarding Roth's misdeeds

In the postconviction record, there is information about Roth from three documents.

(1) Ex. 56; Report of Temporary Administrator; App. 269.

In David Roth's Estate the court appointed a Temporary Administrator to investigate claims against Roth. In a report dated October 15, 2015, the Temporary Administrator set out his findings. App. 269.

(2) Ex.54- Petition for Interpleader; App. 250.

Five months after Roth’s death, his law firm, Gallagher, Langlas and Gallagher (GLG), with its insurance company, filed a Petition for Interpleader. In this unusual civil proceeding, GLG sought to join all the claimants against the law firm and Roth into one proceeding.

The document is important because it listed the potential claimants, starting at page 5. App. 254. There were 85 claimants.

(3) Ex. 53- Counterclaim by GLG against Veridian Credit Union. App. 226.

Exhibit 53 is an Amended Answer, and counterclaim filed by GLG, when sued by Veridian Credit Union.

The Counterclaim described the history of how Roth opened bank accounts at Veridian, bank accounts that were secret.

Exhibit 58 is a compilation of claims, by approximate date, prepared from those documents. App. 318. This compilation puts the claims in chronological order. They show what was going during the representation of Farnsworth from April, 2012 through September, 2014.

What did the evidence show?

The best summary of Roth's misbehavior was submitted by temporary administrator Brad Brady. Here is what Brad Brady found.

> ... (O)ver a period of many years, Roth misappropriated millions of dollars from a number of persons, and transferred those funds to himself, through accounts that he controlled, including accounts in his name, the names of other fictitious entities, a secret account in the name of GLG, and the GLG trust account. The misappropriated funds were transferred to and from multiple accounts, including the account at Lincoln Savings Bank from which the premiums on Roth's life insurance were paid, and also were commingled by Roth with other funds. Roth engaged in this extensive fraudulent activity while acting as the president and managing partner of GLG, victimizing and concealing his misappropriations from his clients, "investors" and GLG and its shareholders.
> Exhibit 56, pg. 2.

Tim Boller, a partner in GLG, testified at the postconviction hearing.

There were essentially three types of claims against Roth.

(1) Roth would settle a case, telling the client that the settlement was a lower number than what was obtained. He kept the difference. PCR Tr. p. 78, lines 8-11.

(2) He would convince clients to invest in wonderful opportunities that Roth had available to him. PCR Tr. p. 78, lines 12-19.

(3) There was straight out borrowing money, millions of dollars, guaranteeing that the lenders would receive 12% return. PCR Tr. p. 78, lines 20-25.

Roth never invested the money. Rather, he put the money in one of his secret accounts, building a classic Ponzi scheme. PCR Tr. p. 78-79, lines 12-19, 8-18.

Roth was somewhat remarkable in his misdeeds. Boller testified that prior to Roth's death there had never been a complaint from anyone. PCR Tr. p. 77, lines 14-19. Presumably, this occurred because Roth was misappropriating money from people at an increased rate over time, using those funds to make the necessary payments to buy time. The extensive borrowing of millions of dollars picked up in 2013 and 2014 as things were closing in.

Roth was defrauding clients and borrowing from others all during this time. What was he doing with the money? Some of it was used to pay others in the pyramid. Roth also was buying stuff. Brady's report found nine pieces of real estate, seven vehicles (including a Jaguar), four boats, six boat trailers, eight other recreational vehicles, four power boat lifts, two mopeds, and two motorcycles. Exhibit A of Exhibit 56, pg. 7. Roth had run up $600,000 in credit card expenses in the year before his death.

The evidence of the claims against Roth shows that in April, 2012 he would have been desperate for another $100,000. All he had to do for that money was to accept a murder case.

Farnsworth Financial arrangement with Roth

The Farnsworth's family had no experience with hiring a criminal lawyer. After Farnsworth was arrested, the family was referred to Roth. The family met with Roth, who then visited Farnsworth in jail. PCR Tr. 20, lines 12-17.

Roth asked for a $100,000 retainer. His assistant, Jessica Moothart, testified that Roth had not really wanted to undertake the murder case. That was why he asked for so much money. He never figured that the family would agree. To his surprise, the family agreed. PCR Tr. 59, lines 2-8.

When it turned out that the bond was doubled, Roth agreed to lower his fee to $90,000. That made sense, since the bonding company was going to cost more. PCR Tr. p. 27, lines 12-14.

There was no written contract. PCR Tr. p. 28, lines 7-9. There was only a reference to an hourly rate in an internal document prepared after Farnsworth's arrest. Exhibit 38. This document was with the billing documents that were provided after his death.

Anji Barnard was the family member who had the most contact with Roth. The family agreed to pay Roth $90,000. $75,000 was to be paid at the beginning, then $3,000 a month for five months. PCR Tr. p. 28, lines 1-6.

The family paid Roth $75,000 on May 16, 2012. See Exhibit 31. Roth deposited that retainer into one of his secret accounts at the Veridian Credit Union. See the back of the check in Ex. 31. It was not put in any trust account, something that is required by the Code of Responsibility.

The family paid Roth another $15,000 over time. The first check for $3000, also went into the secret account at Veridian. The remaining checks were deposited into the firm trust account.

On May 4, 2012, prior to the retainer, Roth sent his only bill to the family with a cover letter. See Ex.39 and 40. App. 218, 219.

There was no further billing during the representation. Moothart would prepare monthly statements for Roth for all of his cases, including Farnsworth. Roth would not allow them to be sent. PCR Tr. p. 54-55, lines 8-25, 1-6.

The reason was obvious. He would not have wanted to send a statement that would not reflect the $75,000 retainer. Even an inexperienced family would have asked about that.

After Roth's death, the family requested all documents from the file, including any billing statements. PCR Tr. p. 30, lines 16-18. The "bills" for the period from May through December of 2012 were turned over to the family when they got the whole file. Exhibits 41-45.

The bills showed a curious payment of $5,000 to someone called "Natural Plus." See PCR Ex. 43. This was a payment for landscaping on one of Roth's houses. See Ex. 46.

This payment to "Natural Plus" says something about the level of representation provided by Roth.

About the time that Roth paid Natural Plus, he told the family he was hiring an expert on taekwondo. This expert was going to testify about how a person trained in taekwondo would use his hands as weapons. PCR Tr. p. 33-34, lines 22-25, 1-4.

Roth told the family that he had paid for this expert, but chose not to use the person. PCR Tr. p. 34, lines 5-14. He still had to be paid. This was the only expert that was ever discussed.

Roth never provided the family with an accounting.

When Roth agreed to take the case on appeal, the family asked if he had enough money. He said he did. PCR Tr. p. 31, lines 12-16.

On March 28, 2014, during the appeal, Roth returned $8,000 to Farnsworth's father, James Farnsworth Sr., at the request of the family. See Ex. 37. That check came from the GLG's trust account. James Sr. was the source of all the funds for the legal fees and for the bond. He needed the funds for his property taxes. PCR Tr. p. 31-32, lines 19-25, 1-4. Roth gave him the money, presumably to avoid anyone asking for an accounting.

How is this relevant

The State objected to this financial information based on relevance. Judge Foy, while allowing the evidence, mostly agreed. Here is the relevancy.

Roth's overall dishonest behavior extended to the Farnsworth murder case. From the very beginning of the case, the representation was infected with dishonesty and unethical conduct. There was no fee agreement. The initial $78,000 paid by the Farnsworth family was put into one of Roth's secret bank accounts at Veridian. It was not put into a required trust account.

He put the retainer into the secret account and then presumably used it. It was then gone, used as part of the Ponzi scheme. It was no longer available to pay for such things as a second attorney to assist at the trial or a forensic expert for the defense. Such an expert could have provided assistance in several forensic issues associated with the case.

Roth had little experience with serious jury trials or direct appeals

David Roth had a busy practice. While he had lots of small criminal cases, he had little trial or appeal experience in connection with felonies, to say nothing of murder cases.

Evidence was submitted showing Roth's experience with felony trials and appeals. Exhibits 47 and 48. This evidence was not contradicted. Judge Foy did not discuss this evidence. He did not make any findings about Roth's experience, even after Farnsworth asked to have the findings enlarged. App. 32.

Jury trial experience in felony cases

Exhibit 47 is the statistical breakdown of cases from courts on line, where Roth was listed as Attorney for Defendant in FECR cases. There were three jury trials for David Roth between the year when Courts Online started, 1995, and his death in 2014. One was the Farnsworth case. The other two cases were the Espinoza case in Bremer County and the Westerman case in Blackhawk County.

Espinoza was a guilty determination by the jury. Westerman was a bench trial with a not guilty verdict.

Several things are clear. When he took the Farnsworth murder case in 2012, David Roth had tried one felony jury trial. That was in 2007. In 2009, he tried one other felony case without a jury. Roth did not have the experience to undertake a murder case, particularly without backup.

Roth had been involved as co-counsel in one murder case in Black Hawk County. The case was resolved by plea bargain. Exhibit 50.

Appeal experience

Similar methodology was used in preparing Exhibit 48. There were five criminal appeals other than Farnsworth. Of those five, Roth briefed only one case. In that case his client lost. State v. Voshell, 2008 WL 2522117 (Iowa App. 2008). Roth defaulted twice, both on the Appendix and the Final Brief. The only claim he raised was not preserved.

In the other four criminal cases on appeal, he either withdrew after defaulting or dismissed the appeal, hopefully with the consent of his client. In 3 of the 4 cases, he defaulted before the case ended.

Roth had little or no experience in criminal appeals. He did not particularly know or follow the rules. In the one case that he had ever written a brief, he raised claims that had not been preserved.

What is the relevancy of this evidence?

Roth's activity in the Farnsworth trial and on appeal demonstrated little understanding of trial work or appellate practice. Both at trial and on appeal, this resulted in poor presentation of the issues and the arguments.

By itself, the fact he did not have much experience will not get Farnsworth relief. It does provide the lens with which to view Roth's work in the Farnsworth's case.

ARGUMENT

I

INEFFECTIVE COUNSEL REQUIRES A NEW TRIAL SINCE TRIAL COUNSEL DID NOT CONSULT WITH OR EMPLOY AN EXPERT PATHOLOGIST

Standard of Review:

Ineffective-assistance claims are reviewed *de novo.* State v. Albright, 925 N.W.2d 144, 151 (Iowa 2019).

Preservation of Error:

The claim was presented in the postconviction application and addressed on the merits by Judge Foy.

Summary of argument

While all agreed that James Farnsworth caused the death of Ian Decker, there were real issues as to whether he was "justified" or the extent of his criminal

responsibility. Those issues required evidence, including expert testimony. Indeed the nature of the injuries were particularly relevant to the outcome of the case.

The State had a forensic expert, State Medical Examiner, Julia Goodin. She was deposed. She testified. Farnsworth had no expert. There is no evidence that David Roth ever consulted with one. That by itself in a First Degree Murder case, with a defense based on justification, would be a breach of a basic duty. Given the evidence presented by the expert at postconviction, the breach of the duty was prejudicial.

There were two issues that could have been developed by a defense expert.

(1) What was the significance of the description of the fatal stab wound as "downward?

(2) Were there 3 stabbing movements or just two?

At trial the State's expert testified and with help from defense counsel, described that the fatal knife wound as being in a "downward" direction. The prosecutor highlighted this both her closing arguments explaining that the fight could not have happened as described by Farnsworth. She also argued that there were 3 stabbing actions, again inconsistent with Farnsworth's description.

In postconviction Farnsworth presented an expert, Dr. Brad Randall. Dr. Randall questioned the extent and significance of the "downward" angle testimony. He also questioned whether there were 3 stabs or just 2.

This testimony establishes the prejudice necessary to set aside the conviction.

Factual discussion

Discussion of downward angle

Dr. Julia Goodin, the State Medical Examiner, did the autopsy. She was deposed and latter testified. The autopsy report was PCR Exhibit 18. App. 112.

In the report Goodin described three wounds. (1) the fatal stab wound in the chest; (2) the two inch cut on the forearm; (3) the stab wound on the thigh. She said the stab wound to the chest had a “direction" which was "downward, left to right". Ex. 18, p.1; App. 112.

In deposition Roth asked Dr. Goodin about the angle of the wound to the chest. She said it had a "downward direction, left to right". Exhibit 13, page 29, lines 18-23.

At trial Dr. Goodin identified those three injuries on direct examination. Crim. Tr. p. 480 lines 24-25, 483 lines 22-23, 484 line 15. In something of a surprise, prosecutor Krisko did not ask Dr. Goodin about the angle of the fatal wound.

Into that vacuum, however, came defense attorney Roth. Krisko had asked Goodin about the stab wound to the thigh. Dr. Goodin told her it “went upward and

left to right", Crim. Tr. p. 485, line 11. That was the extend of her examination on the subject of angles.

At the beginning of Roth's cross, he asked about the wound to the chest.:

> "Q: And that suggested to you, did it not, that the entry would have been more perpendicular as it related to the wound to the chest?"
>
> A: "I think what I said was that there might have been movement with the chest wound..... Rather than saying it was more perpendicular because neither wound is exactly perpendicular. They both have direction." Crim. Tr. p. 490, lines 5-14.

Susan Krisko was reminded of the angle of the wounds. Here was the exchange on re-direct:

> Q: "Just to be sure I'm not sure that we talked about this, the hip wound you said was – now, when he's talking perpendicular, especially I am challenged, so he's talking this way (indicating) correct?"
>
> A: "As if it went straight in, but it really has a direction of going upward and sort of left to right."

Q: “Slightly upward, left to right from the hip but the chest wound was slightly downward, left to right?”

A: “Yes.”

Crim. Tr. p. 491-492, lines 20-25, 1-3.

Krisko’s pounced on this in testimony in closing argument. Here is what she said about the angle of the chest wound in her initial statement to the jury.

> Those are really fighting issues in this case. No pun intended. We know he was stabbed. And think about this for a minute—and I had to have the coroner explain to me because I--- the perpendicular question kind of threw me, but it was a good way to figure out. **If you believe James, he was somehow crouched, flung his knife, and Ian stood back and he was stabbed. Now that doesn’t explain the other two wounds, of course. But that’s not how the chest wound happens. Here’s Ian’s chest, and it’s a downward angle. You don’t get that from being below someone.** You get that from being at the same level, like the witnesses said, when they were both standing up, or both at the same level. We already have that information in the record. Not contradicted in any way.
> Crim. Tr. p. 523-524, lines 18-25, 1-6.

In his closing arguments, Roth did not mention the angle of any wound **at all.**

Krisko highlighted the downward angle conclusion in her final closing.

> We have medical testimony that says, you know what, that wound right there, where it was, you know, how hard that is to get through there. **We have the direction of the wound showing that there is no way that James was under Ian when he stabbed him in the chest because that could not—**

> **that would be an upward direction, not a downward direction.** Crim. Tr. p. 547, lines 2-8.

The jury was left with a clear impression that James Farnsworth could not have been under Decker at the time that he inflicted the fatal wound.

Factual discussion in the criminal record about the number of stab attempts.

There were three injuries to Decker. There were two stab wounds, one to the chest that was the fatal injury and one to the leg. There was a third injury to the arm that was described as a "defensive wound".

One factual question was whether these three injuries were the result of 2 or 3 stabbing attempts.

In Goodin's deposition, Roth asked if it was possible that the same movement caused the injury to the arm and the injury to the chest. Ex 13, p 15, lines 1-8. Goodin said she would not be able to determine that. You would need to line them up with the position of the two wounds, and she had not been asked to do that so she had not done that. Ex 13, p 15, lines 1-8.

Roth also took the deposition of Dr. Steven Goetz. PCR Exhibit 14. Dr. Goetz was the on-call medical examiner for Cerro Gordo County on April 14, 2012. He examined the body at the hospital.

He described the wound on the arm being a "defensive wound." He said it was possible it was the same thrust as the chest wound. Ex. 14, p. 12, lines 5-12 and p. 17, lines 4-9.

Dr. Goetz did not testify at trial.

Dr. Goodin did testify. She said the arm wound was more of a defensive wound. Crim. Tr. p. 491, lines 9-12.

There was no evidence as to whether the injury to the arm and the chest were the result of the same movement.

PCR Evidence from Dr. Brad Randall

For the post-conviction, James Farnsworth hired an experienced pathologist to review the Decker autopsy and certain trial testimony. Dr. Brad Randall provided a Report. Ex. 87. App. 354. The State chose not to contest his report.

The CV of Dr. Randall appears as Exhibit 85. App. 338. He taught at the University Of South Dakota School of Medicine and consulted with the South Dakota Crime Laboratory. He has been an expert in South Dakota, as well as Iowa. He had performed over 2,000 autopsies and investigated in excess of 12,000 deaths.

Dr. Randall reviewed the autopsy report from Dr. Goodin, her trial testimony, and the closing arguments from trial. He also reviewed the preliminary report of the investigation by the Cerro Gordo Medical Examiner, Dr. Goetz.

He was asked two questions. First, what was the significance of the testimony that the fatal chest wound occurred in a "downward direction." He was also asked whether the evidence showed two knife movements or three.

Here is his opinion with regard to the angle of the stab wounds.

> "I have no reason to question the autopsy findings and conclusions from Dr. Goodin's report. While I do not question her description of the directionality of Mr. Decker's chest wound as "downward," the determination of directionality of stab wounds often is somewhat subjective. Dr. Goodin provides no quantifying information regarding the degree of the angle of the downward penetration. It is entirely possible that the degree of the angle of the downward path may have been negligible. **The State was in error regarding its statements in Closing. It is nearly impossible to infer relative positions of a victim and a person wielding a knife, by virtue of directionality of a stab wound to the chest. (emphasis added)** Mr. Farnsworth certainly could have been positioned dependent (under) Mr. Decker at the time he inflicted the wound to Mr. Decker's chest. A downward directed stab wound would not disqualify that (or essentially any other) position between Farnsworth and Decker."
> Ex. 87, p. 3-4. App. 356-357.

Here is what he said about the number of knife movements.

> "I agree with the Cerro Gordo Medical examiner that the slash wound to the left arm represented a defensive injury. This appeared in the report by Dr. Goetz.
>
> It is quite possible that the left arm injury could have been sustained as Mr. Decker tried to block the stabbing knife that ultimately entered his chest. In that

> scenario Mr. Decker would have been the victim of only two stabbing thrusts rather than two stabbings thrusts rather than two stabbings and a separate slashing wound."
> Ex. 87, p. 4.

Ineffective counsel for failure to obtain an expert

The test to be applied to a claim of ineffective counsel is well developed. Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed. 2d 675 (1984); Taylor v State, 362 N.W. 2d 683 (Iowa 1984). The claimant must demonstrate (1) counsel failed to perform an essential duty, and (2) prejudice resulted. Claimant must satisfy this burden by a preponderance of the evidence, and rebut the presumption of counsel's competence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983) There must be a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

There was Ineffective Assistance of Counsel as to this issue. Farnsworth can show both a breach of a duty, and prejudice.

The right to have an expert in a criminal case

The right to have an expert or the duty to hire an expert comes from two sources. First, it comes from the Sixth Amendment, the right to counsel. Several older Iowa cases discuss the obligation of a trial court to appoint an expert to assist

counsel in criminal cases. See State v. Coker, 412 N.W.2d 589, 593 (Iowa 1987)(reversing conviction after denial of expert) ; State v. Leutfaimany, 585 N.W.2d 200, 207-08 (Iowa 1998)(upholding denial of appointment of expert). These direct appeal cases reviewed the decision to deny a request for an expert. An expert must be appointed where 'necessary' to counter the State's evidence. State v. Van Scoyoc, 511 N.W.2d 628, 630 (Iowa App.,1993)

The second source for the duty comes from a related duty required of effective counsel. Counsel must conduct a reasonable investigation or make reasonable decisions that make a particular investigation necessary. Ledezma v. State, 626 N.W.2d 134 (Iowa 2001) and *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674, 695 (1984).

Remembering this foundation, there have been a number of cases in Iowa where post conviction courts have addressed whether trial counsel was ineffective in failing to obtain an expert. Davis v. State, 520 N.W.2d 319, 322 (Iowa App.,1994) (should have gotten expert but no prejudice since opinion about the same.); Hernandez v. State, 2005 WL3115850 (Iowa App. 2005) (conviction reversed since there should have been an alcohol expert.) ; Moon v. State, 2007 WL 1345732, at *3 (Iowa App.,2007)(no ineffective counsel since the postconviction ballistics expert's opinion was not different from State's expert.); Lukinich v. State, 2019 WL 333047 (Iowa App.,2007)(no breach of duty or

prejudice since ballistics expert's testimony not all that different.); Linn v State. 929 N.W. 2d 717 (Iowa 2019) (Postconviction court should have appointed expert on Battered Woman Syndrome.)

For other cases finding ineffective counsel see Matter of Volk, 2018 WL 840184 (Wash. App., 2018); Eaddy v. State, 845 So. 2d 961 (Fla. Dist. Ct. App. 2003); Byrd v. Trombley, 580 F. Supp. 2d 542 (E.D. Mich. 2008); State v. Maurice, 903 P.2d 514 (Wash. App. 1995); Gersten v Senkowski, 428 F.3d 588, 608 (2nd Cir. 2005)(failure to consult with expert in child sex abuse case was ineffective.)

One Iowa case in particular should be discussed.

In Hernandez v. State, 2005 WL3115850 (Iowa App. 2005) the Court of Appeals reversed a conviction for failure to obtain an expert. Hernandez was convicted of homicide by motor vehicle. In postconviction he argued his trial counsel failed to retain an expert toxicologist to examine the blood-alcohol testing procedure.

The postconviction court granted him a new trial. The State appealed. The Court of Appeals affirmed.

> Counsel is required to conduct a reasonable investigation or make reasonable decisions that make a particular investigation unnecessary. *Ledezma,* 626 N.W.2d at 145 (citing *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 695). "In each instance, the decision to investigate a particular matter must be judged in relationship to the particular underlying circumstances." *Id.*

> Hernandez v. State, 2005 WL 3115850, at *3 (Iowa App., 2005)

Part of that essential duty to investigate requires an investigation into whether experts might be needed. In Hernandez, trial counsel testified at the post-conviction that he had discussed the case with a toxicologist, choosing not to pursue that line of investigation.

However that toxicologist told the lawyer he needed to see all the records. Counsel had no further contact with a toxicologist.

The Court said this about prejudice:

> We conclude Hernandez was prejudiced. Had trial counsel used the funds explicitly earmarked to conduct an investigation there is a strong probability he would have retained an expert who would have testified in a manner similar to that of Corbett at the PCR hearing and called into doubt the validity of the State's BAC test. The other evidence of intoxication was not so strong; therefore, we conclude there is a reasonable probability the jury would have returned a verdict of not guilty if trial counsel had not breached an essential duty.
> Hernandez v. State, 2005 WL 3115850, at *4 (Iowa App., 2005)

Hernandez sounds a little like Farnsworth. In Hernandez, $5,000 of the posted cash bond was returned. Hernandez asked for the funds to retain an expert. The attorney, however, just applied the money to his bill. The Court noted that Hernandez's attorney committed an ethical violation and his license to practice law was suspended due to his actions. 2005 WL 3115850, at *2 (Iowa App., 2005)

The Farnsworth family gave Roth $90,000. Roth stole most of it. He knew there were forensic issues. The $5,000 for an expert was used to pay a landscaper. Certainly, had Roth not committed suicide, he would have lost his license.

How do the lessons from these cases apply to Farnsworth?

There was a duty to retain an expert.

This was a First Degree Murder case. Every possible defense should have been pursued.

Roth was aware of the two issues forensic issues presented in this claim. He had deposed Goodin about the "downward" angle of the fatal wound. Depositions also suggested that there were only two lunges with the knife. Goetz deposition, Ex. 14 p. 17-18 lines 4-25, 1-9. App. 106.

These issues were central to the defense of justification. They went directly to whether Farnsworth's version of the fight was to be believed.

Roth never consulted with or obtained the services of his own expert pathologist. Reasonable defense counsel in a First Degree Murder case would have employed a forensic pathologist. There was a clear breach of duty.

In fact Roth was ineffective in several ways about this forensic evidence.

First, he was ineffective at not having consulted with an expert pathologist.

Second, he knew the downward angle was a potential problem. Once the prosecution apparently forgot that evidence on Goodin's direct examination, Roth never should have opened the door to let that evidence in.

Finally, he should never have been silent in the face of the Prosecutor's statement to the Jury in closing that Farnsworth could not have inflicted the injury from below. He could at least have used logic to explain how an injury could be "downward" if Decker was bending over Farnsworth.

There was prejudice.

Prejudice is established by Dr. Brad Randall's evidence. His report and qualifications appear as Ex. 85, 86, and 87. App. 338, 350, 354. The State chose not to cross examine the report. The State presented no contrary expert evidence.

Dr. Randall helped on the downward angle issue. The autopsy report was not clear how downward the angle really was. More importantly, he makes clear that you just cannot tell where combatants were standing from a downward angle of a wound like that. **In Dr. Randall's opinion, the wound could very well have been inflicted when Decker was standing over Farnsworth.**

Quite frankly, this could have been something that a careful defense attorney could have argued just based on the relative positions of the combatants. Cerro Gordo County Attorney Carlyle Dalen acknowledged this in his evidentiary

deposition. Ex. 88, p. 23-24, lines 23-25, 1-9. At the same time this conclusion would clearly carry more weight coming from an expert.

An expert would also have helped on whether there were two slashing motions or three. In Randall's opinion the arm injury could have been a deflection into the chest.

Once again, Roth did not obtain the services of a pathologist, even on a consulting basis. For that reason, he had nothing to back up this theory that the injury to the chest was actually a deflection.

In a First Degree Murder case where the family has paid the lawyer $90,000, reasonable Defense Counsel would have employed an expert. Dr. Randall's opinion shows how that expert could have helped.

Prejudice is also clear as the defense was based on justification. The evidence was important to many parts of the defense.

The angle of the wound was presented by Krisko in closing arguments, not once, but twice. She certainly thought the evidence important.

She explained that this was hard science, showing that James Farnsworth's description of how the fight happened could not be true. It could not have happened with him being under Decker, who was raining blows down on top of him.

James Farnsworth did not testify. But his side of the story went to the jury through his statements to police. Farnsworth said he was underneath Decker and threw the knife upwards. This evidence was substantially undercut by Krisko's argument about the angle of the wound. A defense expert would have refuted that argument.

Farnsworth has shown prejudice.

Response to Judge Foy

Judge Foy rejected Farnsworth's claim about the expert witness. App. 38. His reasoning does not withstand analysis.

First, he characterized whether to obtain an expert as a matter of trial strategy. In a murder case, where you know from depositions that there are forensic issues, there can be no strategy not to at least consult with an expert.

Judge Foy said that a capable attorney could avoid hiring an expert if he is was able to "limit or impeach the persuasive force of the expert… through effective cross examination". At the same time, if you wait until whether you have had effective cross examination, that is a little late to hire an expert. Maybe it might be a matter of strategy to call an expert who is available. That is not what happened here. Moreover Roth certainly was not effective in cross examining Dr. Goodin. If anything he was instrumental in having the downward angle evidence presented.

Judge Foy thought that Farnsworth had not shown prejudice. He said "Dr. Randall took issue with the opinion of Dr. Goodin regarding directionality". The judge however, did not think that Dr. Randall had expressed a firm conclusion regarding the relative positions.

Dr. Randall was quite firm in his opinion that you just cannot tell from the angle where the combatants were positioned.

Dr. Randall's testimony certainly would have allowed a competent attorney for Farnsworth to substantially rebut Krisko's closing arguments.

II

THERE WAS INEFFECTIVE COUNSEL REQUIRING A NEW TRIAL WHEN DEFENSE COUNSEL DID NOT MENITON THE STANDARD OF PROOF DURING CLOSING ARGUMENT

Standard of Review:

Ineffective-assistance claims are reviewed *de novo*. State v. Albright, 925 N.W.2d 144, 151 (Iowa 2019).

Preservation of Error:

The claim was presented in postconviction application and addressed on the merits by Judge Foy.

Summary of Argument

This argument is not complicated. While there was no question that Farnsworth caused the death of Decker, there was considerable factual dispute as to whether the action was justified. Indeed, the jury found only second degree murder.

Central to factual determinations, in our judicial system, is the burden and standard of proof. The State not only bears the burden of proof, but it is also must show the proof beyond a reasonable doubt.

Roth in his closing argument failed to mention the standard of proof. That is so remarkable that it should be said a second time. **Roth in closing argument failed to mention the standard of proof, at all.**

There should be no question that any reasonable defense attorney, in a case where facts are at issue, would mention the standard of proof.

Judge Foy questioned whether there was prejudice. His reasoning is flawed. Judge Foy reasoned that Roth was "effective" in his argument, as the jury rejected first degree murder and deliberated for four hours. The conclusion that there was a real issue about self-defense should lead a court to conclude that there would have been prejudice. Certainly there could not be reasonable confidence in the outcome at trial.

Factual basis for claim

The factual basis for this claim is short. It is not in dispute. There is the transcript from closing arguments.

David Roth failed to mention or discuss the standard of proof at any time during in his closing argument.

Legal Argument

Standard for ineffective counsel

Farnsworth must show (1) a breach of essential duty, and (2) prejudice. He must show this by a preponderance of the evidence, rebutting the presumption of counsel's competence. Meier v. State, 337 N.W.2d 204, 206 (Iowa 1983) There must be a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

Breach of Duty

In our jury system, the State must prove its case "beyond a reasonable doubt." This is a constitutional requirement. It is something that every first year law student would know. If you had to think about the top two things you would always have to emphasize to a jury in a criminal case if you were a defense lawyer,

the first would be that the State bears the burden of proof. The second would be that the proof has to be "beyond a reasonable doubt".

In this case, the transcript shows Roth never mentioned "beyond a reasonable doubt" once.

That omission has to be below the level of competent counsel.

Farnsworth's current counsel, in the research for this brief, has not been able to find any case where counsel was declared ineffective for failing to mention or discuss the standard of proof, that is 'beyond a reasonable doubt'. Undoubtedly, that is because self-evident propositions are often the hardest to document.

The Iowa Supreme Court talked about "beyond a reasonable doubt" in State v. McGranahan 206 N.W.2d 88 (Iowa 1973). In McGrabagan a very brief instruction on areasonable doubt was given, apparently over an objection. The Court reversed the conviction with this statement:

> "We do not wish to be understood as holding or intimating that trial courts are bound by any model or form in formulating instructions. We especially do not wish to be understood as intimating brief and succinct instructions are in any way discouraged. **However, an understanding of reasonable doubt is crucial to the deliberations of the jury in nearly every criminal case."**
> 206.NW.2d at page 92.

In Farnsworth, instruction 13 did provide more explanation than had been used in McGranahan. At the same time, what happened in Farnsworth was that

Roth did not discuss the instruction or the constitutional standard. This omission was clearly below the level of competent counsel.

Was there prejudice?

This was the case with the plausible justification defense. Even with Roth's mistakes, the jury rejected First Degree Murder. This Court should conclude that the failure to mention "beyond a reasonable doubt" was harmful. There cannot be confidence in a verdict where defense counsel made this large a mistake.

III

AFTER THE PROSECUTOR TOLD THE JURY THAT THEY DID NOT HAVE TO BE UNANIMOUS IN DECIDING THE JUSTIFICATON ISSUE, IT WAS INEFFECTIVE COUNSEL WHEN DEFENSE COUNSEL DID NOT CHALLENGE THE SUFFICIENCY OF EVIDENCE THAT FARNSWORTH HAD INITIATED THE FATAL CONFLICT EITHER AT TRIAL OR ON APPEAL

Standard of Review:

Ineffective-assistance claims are reviewed *de novo*. State v. Albright, 925 N.W.2d 144, 151 (Iowa 2019).

Preservation of Error:

The claim was presented in the postconviction application and addressed on the merits by Judge Foy.

Summary of argument

This argument is rather complicated. It is also somewhat unusual. But it does logically follow from how justification is decided in this state and the rules when criminal verdicts do not have to be unanimous.

In our criminal justice system, jury verdicts are required to be unanimous. In the perhaps unusual circumstance where alternate theories are presented, an instruction can be allowed for the jury to be less than unanimous in picking the theory. See Model Jury instruction 100.16. See also State v. Bratthauer, 354 N.W. 2d 774 (Iowa 1984). This has been the law in Iowa for 35 years.

There is however sort of a catch. In that unusual circumstance where the jury does not have to be unanimous, every alternative considered must be supported by sufficient evidence. State v. Schlitter, 881 N.W.2d 380 (Iowa, 2016)

Moreover, the Iowa Supreme Court has found that it is ineffective counsel for counsel not to make a Motion for a directive verdict, based on the insufficiency of all the different theories pursued. State v. Schlitter, 881 N.W.2d 380 (Iowa, 2016)

In Farnsworth, the unanimity issue is presented in the context of the justification defense. Both Uniform Jury Instruction 400.2 and Iowa Code Section 704.6 call for the rejection of "justification" if the State proves any one of the 5 factors.

Instruction 24 explained the different factors.

A person is justified in using reasonable force if he reasonably believes the force is necessary to defend himself from any imminent use of unlawful force. If the State has proved any one of the following elements, the defendant was not justified:

1. The defendant started or continued the incident which resulted in injury or death.

2. An alternative course of action was available to the defendant.

3. The defendant did not believe he was in imminent danger of death or injury and the use of force was not necessary to save him.

4. The defendant did not have reasonable grounds for the belief.

5. The force used by the defendant was unreasonable.

App. 81.

In Farnsworth, there was no jury instruction about unanimity regarding the justification defense.

Instead, the prosecutor essentially made up the jury instruction when she told the jury during closing arguments that they did not have to be unanimous. Crim. Tr. p. 516-517, lines 17-25, 1-13. When Roth did not object, the lack of unanimity became the equivalent of a jury instruction.

Krisko gave an evidentiary deposition in the postconviction. She testified that her statement about unanimity was no big deal. It was clearly the correct statement of law. Ex. 89 p. 37-42.

It must be assumed that the prosecutor was correct. Justification is one of those circumstances where the jury does not have to be unanimous. It is sufficient that each and every juror found the existence of one of those five factors, beyond a reasonable doubt.

The problem for the State and the problem presented in this case, is that when jurors do not have to be unanimous as to a particular theory, there has to be legally sufficient evidence on each of the alternatives submitted. This is required because otherwise a reviewing Court cannot determine what individual jurors had decided.

Effective defense counsel would have understood the consequence of allowing less than unanimity. Reasonably competent counsel would have made a Motion for a Directed Verdict, at least as to Reason #1 in Instruction 24. That Motion would have been based on the fact that there was not legally sufficient evidence to support that alternative.

There is prejudice in this case because there was not sufficient evidence to support Reason #1.

Factual discussion

The facts with regard to this issue are not complicated or contested.

The Defendant presented a defense in part based on justification.

The judge gave Jury Instruction 24.

Section 1 of that instruction provided that there would not be justification if "the defendant started or continued the incident which resulted in injury or death."

No jury instruction was requested by the State with regard to the issue of jury unanimity with regard to justification.

It was clear that the State was going to argue that Farnsworth could not establish justification because he was “one who initially provoked the use of force”. He initiated the final incident when he slapped Victoria Miller, several hours before the final fight.

This came up several times.

During redirect examination of witness Dority, prosecutor Krisko asked whether Farnsworth was not the first person to be physically aggressive, when he slapped Vickie. Crim. Tr. p. 246, lines 10-13. When Roth objected there was an offer of proof by the State. After the offer, the judge said she was going to sustain the objection. She said that to link the first aggression back to the slap was inappropriate and exceeds what has been allowed. Crim. Tr. pg. 253, lines 13-15.

At the time for complaints about instructions, Roth who had not presented any instructions himself expressed a concern about number 24. Crim. Tr. p. 509, lines 7-10.

Instruction 24 was the justification instruction. Roth did not ask that the Court tell the jury that #1 did not apply. In fact, he did not say anything about alternative one.

Prosecutor Susan Krisko said this to the jury in closing:

> Jury Instruction number 24 goes through this and I'll just put it up here. ... But there are five factors that if we have proven any one of those factors to you beyond a reasonable doubt, he does not have self defense.
>
> **And the law goes even further. The law tells us you twelve don't need to agree on the same principle that gets the self-defense off the table.** If some of you believe that, well, the force was unreasonable – everything else maybe, but, you know, you can't take a knife to a fist fight. But then some of you say, well, no, that's not really what I think. I think he started and continued this incident and the series of events that led up to the death of Ian Decker. Then maybe one or two of you say, well, but, you know, I think that he had an alternative course of action. He could have at any time decided not to keep throwing fire – or throwing gas on that fire by going back, going back, and going back to a place that he was not welcome and he knew it. You can all have a different split back there. **But as long as each and every one of you find one of these factors, there is no self defense.** Crim. Tr. pp. 516-517, lines 17-25, 1-13.

Roth of course did not object to this recitation of the law that was not in any Jury Instruction. He made no counter argument about the lack of unanimity in his closing argument. He just assumed Krisko was correct.

When he sought a directed verdict, he did not specifically object to the fact that there was not sufficient evidence with regard to each of the five justification factors.

On appeal, Roth did not mention jury unanimity. He did not challenge the sufficiency of the evidence with regard to particular alternatives.

Legal Argument

This issue most often comes up when the State pursues alternate theories for how a crime is committed. Assuming alternate theories are compatible with each other, the jury does not have to be unanimous about a particular theory. State v. Bratthauer, 354 N.W. 2d 774 (Iowa 1984)

How is this jury unanimity question applied to consideration of the justification defense?

Under the justification instruction that was given in this case, a person is not justified in the use of force if the State proves any one of five things. The State must prove either (1) the Defendant started or continued the incident; (2)an alternative course of action was available; (3)the Defendant did not believe he was

in imminent danger; (4)there was no reasonable grounds for #4; (5) the force used by the Defendant was unreasonable.

Those are alternate theories.

Here are the steps in the analysis:

Unanimous jury statement becomes law of the case.

Each theory has to be supported by sufficient evidence.

Theory #1 was not supported.

Ineffective counsel allows this to be raised.

There is prejudice because #1 not supported.

The verdict should be set aside

(1) The statement by the prosecutor to the jury about the law became the equivalent of a jury instruction.

When Roth did not complain about Krisko's statement about the law, it became the law of the case. State v. Taggart 430 N.W.2d. 423, 425 (Iowa 1988). By telling the jury that they did not have to be unanimous in selecting an alternative, the State created the equivalent of a jury instruction.

(2) Given the unanimity statement, each of the alternatives had to be supported by sufficient evidence.

A recent statement about the jury unanimity issue is found in State v. Tovar, 2018 WL 6132269, at *6 (Iowa App., 2018)

(3) Theory number 1, that the defendant started the argument is not supported by sufficient evidence.

This can be shown two ways.

During the testimony of Echo Dority, the prosecutor asked Dority who was the first person to engage in aggressive behavior was. Crim. Tr. p. 246, lines 10-12.

Roth objected. The Court sustained the objection. The Judge responded that "to link a first aggression back to the slap I think is inappropriate and exceeds what has been allowed." (Crim. Tr. p. 253, lines 14-15)

In that ruling the Court essentially said that the slap was not the initial aggression in this case.

The second way to look at this is to look at the evidence presented as to whether James Farnsworth initiated the fight with Decker.

The legal question is whether, "the evidence in the light most favorable to the State, drawing all fair and reasonable inferences from it, shows there is sufficient evidence to convince a rational fact finder that laternative #1 was true beyond a reasonable doubt." Schlitter, 881 N.W. 2d. pg. 389.

Under that standard, there just is no way that the slap can be thought of as the initiation of the conflict with Decker. The slap is several hours removed in time. Decker was not present at the time of the slap. Everybody agrees that Decker

attacked Farnsworth. Farnsworth was talking to Miller. He did not even know that Decker was coming to fight him.

(4) Ineffective counsel allows this claim to be raised at this point.

State v. Schlitter, 881 N.W.2d 380 (Iowa 2016) is the case. The Supreme Court found that there was no way to tell from the jury verdict which alternative had been chosen. A court on appeal could not speculate which alternative the jury had picked.

The fact that there was insufficient evidence about one of the alternatives, requires reversal. That question can be addressed since that reasonably competent counsel would have in fact lodged a direct verdict challenge to each and every alternative.

(5) There is prejudice since theory #1 was not supported by the evidence.

IV

THE ADDITIONAL CLAIMS OF INEFFECTIVE COUNSEL, WHEN COMBINED WITH THE FIRST THREE CLAIMS, CUMULATIVELY REQUIRE A NEW TRIAL

Standard of Review:

Ineffective-assistance claims are reviewed *de novo.* State v. Albright, 925 N.W.2d 144, 151 (Iowa 2019).

Preservation of Error:

The claim was presented in postconviction application and addressed on the merits by Judge Foy.

Other claims of ineffective counsel

There are many instances where the performance of Roth dropped below the standard of reasonably competent counsel.

This Section addresses the claims raised at the district court not covered in the first three issues. This section makes clear that Roth was ineffective from the very start of the case to the very end. These claims when combined should require a new trial.

In a way, this poor performance was a reflection of the fact Roth did not have the competence to handle a murder case. However, once having taken the money from the Farnsworth family, he had no choice but to stay with the case as long as he could.

Here are those other claims:

1. Roth should never have taken the case in the beginning.

Roth had little experience with jury trials for serious felonies. Courts Online showed that Roth did not have the required experience for a murder case, particularly if he was to handle it by himself.

The breach of the duty started when Roth took the case, a first degree murder case, that he was not competent to handle. See Rule of Professional Conduct 32:1.1. A lawyer should not handle a legal matter where the lawyer did not possess "the requisite legal knowledge and skill to handle the case". See Iowa Supreme Court Disciplinary Board v. Marx 831 N.W.2d 194, 198 (Iowa 2013).

His legal assistant at the firm testified that Roth really did not want to take the case. That was why he quoted the family such a high retainer. He never thought they would accept. PCR Tr. p. 59, lines 5-8.

Moreover, Roth should never have taken the case involving a serious crime in Mason City. His firm represented the Mason City Police Department. There had been at least six cases, of such representation. See Exhibit 60. App. 336. Roth had personally appeared in Butcher v. City of Mason City. See docket, Ex 65. That was an age discrimination suit against the Mason City Police Department. The facts are found at Butcher v Mason City, 2014 WL 6681033 (Iowa App. 2014).That case started in 2009. Roth was listed as an attorney for the City. Roth handled the jury trial in August, 2013. Roth actually filed a pleading in the case on 1/16/2013. That was during the Farnsworth jury trial.

Was there a conflict?

Farnsworth has to show that the concurrent representation adversely effected the performance. State v. Smitherman, 733 N.W.2d 341 (Iowa 2007) An adverse

effect is when "counsel fails to pursue a plausible strategy or tactic due to the existence of a conflict of interest," State v. Vaughan, 859 N.W.2d 492, 502 (Iowa 2015).

The criminal trial primarily involved civilians who had witnessed the confrontation between Farnsworth and Decker. But police officers for the City of Mason City investigated the case, testified and were deposed. Roth, at least on appeal, argued there was a basis for suppressing part of the statements made by Farnsworth to the police. See Ex. 23. To the extent that he thought there was a basis for suppression, there would have been a conflict.

Tim Boller, Roth's partner, acknowledged there was a sufficient possible conflict to require disclosure and client consent. PCR Tr. p. 85, lines 2-11. Farnsworth testified there was no such disclosure or consent. PCR Tr. p. 101, lines 15-20. Nothing was on the record about waiving the conflict.

This was another case where Judge Foy made no findings with regard to whether there had been a discussion about possible conflict or whether there had been consent.

2. Roth mishandled the original bond conditions and failed to appeal the forfeiture provisions in the sentencing order.

The original bond in the case was $100,000 cash only. App. 7. This was not a particularly unreasonable bond in a first degree murder case. Roth should have left it alone.

Nevertheless, Roth went in for a bond review. The resultant order doubled the amount of the cash bond, and required $50,000 to be posted in Farnsworth's name. App. 8. This was clearly intended to create a fund out of which statutory restitution could be paid in the event of the conviction.

Roth told the family this was illegal for restitution to be part of the consideration of bond. PCR Tr. p. 27, lines 3-9.

Roth did not do anything about it. As part of the sentencing order, the Court specified that the appearance bond would be applied to the outstanding restitution owing in the matter. See Sentencing order App. 11. After sentencing, the Court entered an order expressing the intent to apply the bond to the restitution unless there was objection by any party. App. 13. Roth did not object.

Roth could have objected. Roth could have raised the matter on appeal. There were some members of the Iowa Supreme Court who had question whether cash only bonds were even constitutional as far back as 2003. See State v. Briggs, 666 N.W.2d 573 (Iowa 2003). The bond requirement specifying money in the defendant's name only was set aside in State v. Fletcher, 888 N.W.2d 880 (Iowa 2016).

3. <u>Roth did not provide for sequestering of witnesses.</u>

There was no order on the record requiring sequestering of witnesses. Farnsworth and Barnard testified remembering specifically how the civilian witnesses sat in the courtroom together during the rest of the case. PCR Tr. p. 39 lines 3-9, 102-103 lines 20-25, 1-3.

The State disputed this factual assertion. The victim coordinator testified that no witness were allowed in the courtroom prior to closing arguments. PCR Tr. p. 113, lines 19-24.

A portion of the transcript disputes this testimony. Just prior to Vickie Miller taking the stand a discussion took place between the lawyers and the judge about whether Victoria Miller could be recalled as a witness if the Defendant wanted her to be recalled. Crim. Tr. 267, lines 1-2.

Krisko explained that "she will be easy to find. She has every intention of sitting in after she testifies" (Crim. Tr. p.267, lines 4-5).

Obviously it is a basic part of criminal trial practice to sequester witnesses. There was never any order sequestering witnesses in this case. The evidence from prosecutor Krisko, during the trial, suggests that the victim coordinator's recollection of how things worked was simply not correct.

4. <u>Roth did not tell his client about a plea offer.</u>

A plea bargain was not likely in the Farnsworth case. Yet an offer was made. County Attorney Dalen said in his deposition he had offered second degree murder. Ex. 88, p.18, lines 9-17. The Defendant and his family, however, were never informed about any plea offer. PCR Tr. p. 38, lines 9-11.

Roth should have told Farnsworth. Farnsworth does not suggest he would have taken the offer. This failure would not by itself justify a new trial. At the same time, the failure to communicate the offer is consistent with the fact that Roth had a vested financial interest in having the case go to trial. Resolution by plea bargain would have required him to address the awkward question of how much of the retainer was left.

5. Roth did not object when the prosecutor told the jury how they did not have to unanimous.

In all likelihood, the statement by the Prosecutor to the jury during closing arguments regarding unanimity was a correct statement in the law. At the same time, the failure of Roth to object or make any kind of record at all, illustrates his ineffectiveness. Obviously, if the State was wrong and this was an incorrect statement of the law, then the prejudice is obvious.

6. <u>Roth was ineffective in his examination of Dr. Goodin.</u>

As mentioned in an earlier section, Roth opened the door during his examination of Dr. Goodin , allowing the evidence that the fatal wound occurred in a downward direction. Crim. Tr. p. 490, lines 5-25.

Roth knew about this issue from his pretrial depositions. When the prosecutor failed to raise this point on direct examination of Dr. Goodin, Roth should have stayed away from the subject. Prejudice occurred when the prosecutor was able to emphasize the downward direction in her closing arguments.

7. <u>Roth was ineffective by failing to make any argument in closing regarding the downward angle of the fatal blow.</u>

Dr. Randall in his report makes clear that a downward angle of a wound does not allow you to say anything about the positioning of the two combatants. While obviously this comes best from an expert, it can also be reasoned as a matter of common sense.

If someone is bending over someone when the knife is thrust upward, the resulting wound could well be downward. Prosecutor Dalen, in his deposition, acknowledges at this point as a matter of common sense. Ex. 88, pp 6-8.

Once again Roth should have known about this potential problem. Had he anticipated it, he could have explained to the jury about stabbing upwards when someone is bending over you.

8. **Roth was ineffective on appeal in quite a number of ways.**

Roth had no real experience appealing criminal cases. See Ex 48; App. 224. He had filed briefs in one prior case.

He messed up the combined certificate by identifying the appeal as from a guilty plea. App. 122. This shortened the time for his brief. He then defaulted when it came time to write the brief, having for some reason, only asked for 7 days in his first request of extension.

When he did write his brief, he failed to follow proper procedure. He did not include the required section about preservation of error. Perhaps, had he done that, he would have been more aware of the fact that there were error preservation issues.

He raised two claims on appeal that had not been preserved. The one issue preserved was close to frivolous.

All the claims of ineffective counsel cumulatively establish the necessary prejudice

Individual claims of ineffective assistance of counsel can be considered in isolation. The courts have made clear however that you can also look at them all together. State v. Clay, 824 N.W. 2d 488 (Iowa 2012): (Iowa recognizes the cumulative effect of ineffective counsel when analyzing prejudice)

In this case, Farnsworth has shown ineffective counsel from an unethical, conflicted, and dishonest attorney from start to finish.

Roth should never have taken the case. He had no experience with serious felony trials. Moreover, the case involved a crime in Mason City, where he represented the police department. This was a conflict that should have been disclosed. It was not.

From the beginning, Roth engaged in unethical conduct by not placing the client's substantial retainer into a trust account as required. It was instead put into a secret account, with no accounting. To cover his tracks he prevented bills from being sent.

He mishandled the first thing he did, the bond issue.

He took depositions but did not retain an expert on the forensic issues. He lied to the client about hiring an expert on Taekwondo. Instead he paid for landscaping on one of his houses. He did not tell Farnsworth about a plea offer.

Prior to trial, he filed a Motion in Limine. He had the idea that there was something wrong with part one of the justification instruction. He did not think Farnsworth had initiated the altercation with the slap. Of course he was right. On the other hand, he never did figure out how to present or argue the claim. He tried to exclude the evidence entirely about the slap. That was frivolous.

He tried the case without other counsel. With a $90,000 retainer, he could have found a second chair. At the same time, the retainer was probably long gone, vanishing into his Ponzi scheme that was running at full steam in January, 2013.

On cross of Dr. Goodin, he managed to introduce the issue about the angle of the chest wound. Once he brought it up, and the State ran with it, he had no response.

When it came time for instructions, Roth did not have any. Roth's objections were somewhat incoherent. He did not like instruction 24 but did not propose anything in its place. Crim. Tr. p. 509, lines 7-10.

When it came to closing arguments, his ineffectiveness continued. He did not object to the prosecutor telling the jury about the less than unanimous verdict. He had no response to the downward angle of the fatal injury.

Then, there was that little matter of not mentioning that the State's burden was "beyond a reasonable doubt".

On appeal, after identifying the appeal as being from a guilty plea, he defaulting one time and did not follow the rules in virtually anything he filed, Roth continued to demonstrate ineffectiveness. He raised one preserved claim, challenging the discretionary act of striking a potential juror. The other claims he raised had not been preserved.

When all of these things are put together, the Court can have little confidence in the result from the criminal trial. Farnsworth has established as a cumulative matter that there was prejudice.

CONCLUSION

Ordinarily, there is a presumption that counsel was constitutionally effective. James Farnsworth was represented by a defense lawyer who was stealing from his clients, including Farnsworth, and was engaged in a Ponzi scheme to avoid it being disclosed. If ever there was a case where there should not even be such a presumption this should be that case.

From start to finish David Roth was ineffective. This is not surprising since he did not have experience and was probably a little distracted, while maintaining his deception.

This Court should find based on the significant evidence presented, that the Court cannot have confidence in the jury verdict. For that reason, James Farnsworth should be given a new trial.

RESPECTFULLY SUBMITTED,

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REQUEST TO BE HEARD IN ORAL ARGUMENT

The Appellant hereby requests to be heard in oral argument in connection with this appeal.

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Page Proof Reply Brief was $8.20.

RESPECTFULLY SUBMITTED,

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/s/ Philip B. Mears — 4/5/2020
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