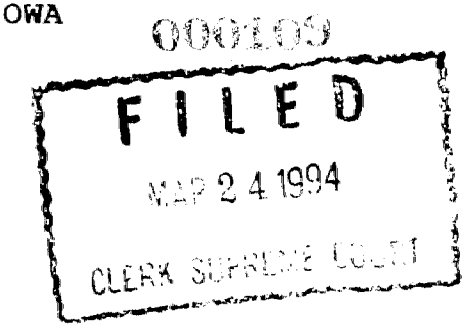
IN THE COURT OF APPEALS OF IOWA

No. 4-072 / 93-0871




**WILLIAM A. FARRAND,**

Applicant-Appellant,

**vs.**

**STATE OF IOWA,**

Respondent-Appellee.

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Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Applicant appeals the district court decision denying his request for postconviction relief. **AFFIRMED.**

Joseph B. McCarville, Fort Dodge, for appellant.

Bonnie J. Campbell, Attorney General, Thomas S. Tauber, Assistant Attorney General, James J. Koll, County Attorney, and Cynthia L. Voorde, Assistant County Attorney, for appellee.

Heard by Donielson, C.J., Sackett, J., and Critelli, S.J.*. Cady, J., takes no part.

*Senior judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

**CRITELLI, S.J.**

The applicant, William Farrand, was originally charged with first-degree arson and attempted murder of Wendy Farrand stemming from an incident which occurred on September 1, 1989. The jury ultimately convicted Farrand of first-degree arson and simple assault. His conviction was affirmed on appeal.

Farrand subsequently filed an application for postconviction relief, alleging ineffective assistance of both trial and appellate counsel. Farrand claimed that his trial counsel made incriminating statements against him. Farrand additionally argued that trial counsel should have objected to the testimony of Theresa Buelt, who stated at trial that he had told her that if Mary Farrand got custody of his minor sister, something bad would happen to Mary. Farrand also claimed trial counsel should have filed a motion in limine to exclude evidence of his drug usage. Farrand lastly maintained trial counsel should have objected to the jury instructions, since they did not instruct the jury on the lesser-included offense of third-degree arson. The district court denied the application. Farrand appeals.

Farrand reiterates his earlier claims that trial counsel made incriminating statements towards him during his opening statements. Farrand next argues that trial counsel should have filed a motion in limine to exclude Theresa Buelt's testimony and evidence of his drug usage.

Farrand also argues the district court should have instructed the jury on the lesser-included offense of third-degree arson. Farrand also claims trial counsel argued the wrong standard of proof by repeating the words "guilt or innocence" rather than beyond a reasonable doubt.

Farrand's more complete claim is that neither trial counsel nor appellate counsel raised the issues set forth in his postconviction relief proceedings and ineffective representation was given to him by counsel at both levels.

**SCOPE OF REVIEW AND APPLICABLE LAW**

In a postconviction relief matter, the petitioner has the burden of proof to establish by a preponderance of the evidence that counsel was ineffective. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987). However, if counsel is found to be ineffective, that error must be found harmless beyond any reasonable doubt. State v. Iowa Dist. Ct., 464 N.W.2d 244, 249 (Iowa 1990).

Because constitutional claims have been raised, our review is de novo on the totality of the circumstances. Brewer v. State, 444 N.W.2d 77, 79-80 (Iowa 1989).

To prevail in a claim of this nature that he had been denied effective assistance, a postconviction applicant must show by a preponderance of the evidence that (1) his counsel failed to perform an essential duty and (2) that the failure prejudiced the applicant. Id. at 83.

To prove a failure of duty, the applicant must overcome the presumption that his counsel was competent and show that his counsel's performance was not within the range of normal competency. Id.

To prove that he was prejudiced, the applicant must show that the alleged failure of duty worked to his actual and substantial disadvantage, such that there is a reasonable probability that but for his counsel's unprofessional conduct the result of the proceeding would have been different. Id.; see also Strickland v. Washington, 466 U.S. 668, 687-94, 104 S. Ct. 2052, ____, 80 L. Ed. 2d 674, 693-98 (1984).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at ____, 80 L. Ed. 2d at 698.

We may affirm the denial of postconviction relief if the claimant has failed to prove prejudice without deciding whether there was a failure of duty. Taylor v. State, 352 N.W.2d 683, 685 (Iowa 1984).

**COUNSEL'S ALLEGEDLY INAPPROPRIATE COMMENTS AND STATEMENTS**

Farrand contends that statements made by his trial counsel in both the opening statements for the defendant and in the closing arguments for defendant amounted to ineffective assistance of counsel and were prejudicial to him. Farrand has singled out very specific and limited

portions of the opening statements and closing arguments. We consider that it is necessary to fully consider those portions of the appendix that refer to these comments and to put them in context to determine, first of all, if they are illustrative of ineffective representation and, if so, if they show prejudice.

In reading through the appendix portions of the opening statement for defendant, it is obvious that the tactic and trial focus of defendant's counsel was to make an effort to discredit the testimony of the primary individual who could testify to his participation in these crimes, that being James Duhn. In addition, Farrand was urging the defense of alibi. On one hand, Duhn was not credible, and on the other hand, Farrand was not present and capable of committing these crimes.

At the beginning of his opening statement, counsel for Farrand stated:

> I prefer to be a little more straightforward about it.
>
> There is (sic) four pieces of evidence that the State has against my client. Those four pieces of evidence are testimony of James Duhn, the person who committed this crime with Mr. Farrand and who is yet to be charged with any crime in association with it, who claims he did it with Mr. Farrand, who was so drunk according to his own testimony that he hardly recollects it.

Further on in the opening statement, Farrand's counsel states:

> . . . Theresa Buelt overheard on a telephone conversation with Bill Farrand a statement by Bill Farrand to the effect that if Mary Farrand ends up

> with custody of Wendy, something bad will happen to her . . . .

Counsel then continued:

> In opposition to those four pieces of evidence, we are going to put on an alibi defense basically saying he didn't do it.

Counsel then went on to describe the activities of Mr. Duhn and Farrand prior to the time the alleged crimes were committed. He stated:

> While they were there April left and Mr. Duhn and Mr. Farrand went down to the Iowa Pub. They did some illegal drugs together. Mr. Duhn got extremely intoxicated.
>
> They then went out after the bar closed with two sisters--Marie and Joyce Peterson. They drank more beer, did more drugs.

He finally completed his opening statement with this comment:

> That's the case. It will be irreconcilable. Either the State is right or the defendant is right. Thank you.

The claim is that Farrand's counsel was admitting his participation in this crime and admitting that his client, Farrand, was guilty.

We find that, looking at the full import of the opening statement, it does not represent to the jury that Farrand is guilty or that he even participated in this crime. It is a narrative statement of what counsel for Farrand feels the evidence will be. It anticipates the evidence to be presented by the State, and it, in a sense, argues the position of Farrand in the proceedings. We find that there

is no ineffective assistance of counsel.

**DEFENDANT'S COUNSEL'S STATEMENTS IN THE CLOSING ARGUMENT AND FAILURE TO OBJECT TO CERTAIN INSTRUCTIONS.**

The next complaints made by Farrand as a basis for a determination of ineffective assistance of counsel have to do with certain isolated statements in the final argument and also failure on the part of trial counsel to object to certain instructions. Since they refer to the same subject, they will be considered together.

In his final argument, Farrand's trial counsel is reviewing or going over the court's instructions with the jury.

In reviewing these instructions, he stated at one point:

> The duty of the jurors is the next section. This says this is your duty. It says you determine whether or not he is guilty or innocent. That's what it says. That's your duty. You determine either he is guilty or he is innocent. You don't have anything to do with the punishment. If he is guilty, the Court will punish him. If he is not, then he goes free. But your duty is to determine whether or not he is guilty or innocent.

(Emphasis supplied.)

In these proceedings, Farrand also asserts ineffective assistance of counsel for the failure to object to language contained in certain instructions. They also refer to the

"guilty or innocent" language referred to above in the final argument.

Instruction no. 5 read as follows:

> You must determine the defendant's guilt or innocence from the evidence and the law in these instructions.
>
> You must consider all the instructions together. No one instruction includes all the applicable law.

(Emphasis supplied.)

Instruction no. 7 stated:

> The defendant has been charged with two crimes. If you find the defendant innocent or guilty on one of the two charges, you must not conclude guilt or innocence on the other. The defendant's innocence or guilt must be determine separately on each charge.

(Emphasis supplied.)

We must consider all the instructions given, as would be true of the jury, and to balance against what could be considered inappropriate language in the aforementioned instructions, we point to certain portions of other instructions that were given.

Instruction no. 3 stated:

> The defendant has entered a plea of not guilty. The plea of not guilty is a complete denial of the charge and places a burden on the State to prove guilt beyond a reasonable doubt. Whenever I instruct you the State must prove something, it must be by evidence beyond a reasonable doubt. If the State does not prove the defendant guilty beyond a reasonable doubt, your verdict must be not guilty.

(Emphasis supplied.)

Instruction no. 4 states:

> The defendant is presumed innocent and not guilty. This presumption of innocence requires you to put aside all suspicion which might arise from the arrest charge or the present situation of the defendant. The presumption of innocence remains with the defendant throughout the trial and thus the evidence establishes guilt beyond a reasonable doubt.

(Emphasis supplied.)

Instruction no. 9 given to the jury states as follows:

> The burden is on the State to prove the defendant guilty beyond a reasonable doubt. A reasonable doubt is one that fairly and naturally arises from the evidence or lack of evidence produced by the State.
>
> If after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty. But if after a full and fair consideration of all the evidence or lack of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.

The marshaling instructions concerning arson in the first degree (no. 19), arson in the second degree (no. 25), and reckless use of fire or explosives (no. 26) all are correct statements of the law and correctly advised the jury as to what it must find in order to find the defendant guilty of any one of those particular charges.

We observe that the two complained-of instructions referred to above and set out in their entirety, i.e. instruction no. 5 and instruction no. 7, are both in reasonable conformity with Iowa Criminal Jury Instructions.

Instruction no. 5 is an exact duplicate statement of what is contained in Iowa Criminal Jury Instruction 100.8.

Instruction no. 7 is a reasonable adaptation of Iowa Criminal Jury Instruction 100.15.

We are not prepared to indicate or hold that either of these Iowa Criminal Jury Instructions are an incorrect statement of the law or that either of them incorrectly apprise the jury of the burden of proof beyond a reasonable doubt that is placed on a jury before defendant can be found guilty of either of these charges.

As indicated before, in his final argument Farrand's trial counsel was going through the instructions that were, in fact, given to the jury. Given the language of the instructions, we find no indication of ineffective assistance of counsel in the argument furthered by Farrand's trial counsel and what has been objected to by him in these proceedings. We likewise find that there was no ineffective assistance of counsel in his failure to object to the instructions as given or in the final argument counsel for defendant made to the jury.

**FAILURE TO EXCLUDE THERESA BUELT'S "THREAT" TESTIMONY**

Farrand's complaint is that his trial counsel did not make diligent efforts to keep the alleged "threat" testimony of Theresa Buelt from being presented to the jury. The fact is trial counsel did file a motion in limine concerning said testimony, and in some respects he did object to that type of testimony coming in during the trial itself. As we indicated before, Theresa Buelt was allowed to testify that she heard Bill Farrand make a

statement to the effect that if Mary Farrand ended up with the custody of Wendy (Farrand), something bad would happen to her.

The trial court allowed this testimony to come in. Mary Farrand was the alleged victim in this case. As indicated above, Farrand was initially charged with the attempted murder of Mary Farrand, his former stepmother.

His argument here is that more serious efforts should have been made to keep this testimony from the jury for two reasons, the evidence was too remote (occurred seven months prior to the alleged crime) and it was also moot because, at the time of trial, custody of the child involved had not been successfully obtained by Mary Farrand.

To counter this argument, the State argues that there are cases that allow testimony that would otherwise be remote to show the criminal intent of a defendant toward the particular victim when, as here, murder or at least attempted murder is the pending charge. The purpose of admitting this evidence is to assist in the proof of the elements of malice aforethought and intent to kill. See State v. Emerson, 375 N.W.2d 256, 259-60 (Iowa 1985); State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979); State v. Kellogg, 263 N.W.2d 539, 541-42 (Iowa 1978).

In regard to the charge that this evidence was moot, it was indicated in the trial transcript that there was still actions pending to change the custody of this minor child.

We find that there were efforts made to exclude this testimony. We also find that there are justifiable reasons to allow the evidence to be admitted over the objection that it was either moot or too remote.

We find no evidence of ineffectiveness of counsel.

**TESTIMONY CONCERNING DEFENDANT'S USE OF DRUGS**

It is true that on a number of occasions testimony regardinig Farrand's drug use and perhaps his drinking to excess at or about the time of the alleged crime came into the record and was considered by the jury. Notably, a good part of such testimony came in the cross-examination by Farrand's trial counsel of the primary witness of the State, James Lynn Duhn. On direct examination, without objection, Duhn testified that he and Bill (Farrand) had been doing some illegal drugs. He said that Farrand was the one who had the drugs. He said it was crank and that they both did some of this "crank."

On cross-examination, Duhn testified that he had a lot to drink at this point (he was talking about driving around with Farrand), that he had done some crank, and that he blanked out on a number of occasions.

The cross-examination testimony was as follows:

> Q. Let's go back to the Iowa Pub. Who had the drugs on them? A. I don't recall.
> Q. Well did you have the drugs on you. A. No that I remember.

Q. Well do you remember passing out any time in the evening? A. I blanked out a few times. I don't know if I really passed out or if I just don't remember being awake or what happened.
Q. How many times? A. A few.
Q. Can you give me an idea? A half a dozen times, a dozen times. A. Half a dozen.

Farrand complains that any testimony concerning his use of drugs should have been kept from the jury. On the other hand, it was in his interest, at least in the opinion of his trial counsel, to discredit the testimony of Duhn, and this was accomplished by questions that elicited answers from Duhn to the effect that he was using alcohol and crank in excess and had passed out a number of times in the course of this evening while he was with Farrand.

It was not possible for the testimony to come in concerning the consumption of alcohol and drugs concerning Duhn without allowing and permitting the full testimony concerning the like use of such narcotics by Farrand himself.

Trial counsel's opinion was that the introduction of such testimony was necessary to discredit Duhn. We find no ineffective assistance of counsel in following this defensive tactic and permitting this evidence to come in without objection.

## FAILURE TO REQUEST INSTRUCTION ON ARSON IN THE THIRD DEGREE

This court's examination of the record indicates that Farrand's trial counsel did not request the original trial court to submit to the jury the included offense of arson in the third degree or, at least, he did not object to the court's failure to do so. It is urged in these postconviction proceedings that the failure to either request such included offense or to object to the trial court's failure to give it amounts to ineffective assistance of counsel and is prejudicial to Farrand.

The trial court did submit arson in the first degree under section 712.2 of the Iowa Code, arson in the second degree under section 712.3 of the Iowa Code, and reckless use of fire or explosives under section 712.5 of the Iowa Code. Other criminal charges were submitted to the jury but they are not related to this postconviction relief proceeding.

In regard to the arson charges, the jury found Farrand guilty of arson in the first degree.

In these proceedings, the State first argues that Farrand was presenting a defense of alibi--an "all or nothing" defense. The lesser-included offense instruction has no bearing on an alibi claim. It can hardly be argued that Farrand's counsel had a duty to

request an instruction which had nothing to do with Farrand's defense.

The State also relies on the holding in State v. Negrete, 486 N.W.2d 297 (Iowa 1992). On direct appeal, Negrete requested a new trial on his first-degree murder conviction because the trial court had failed to submit the lesser-included offense of simple assault. Id. at 298. The jury in that case had failed to convict the defendant of either lesser-included offenses of second-degree murder or involuntary manslaughter. Id.

In affirming the conviction, the court stated:

> The jury's failure to convict defendant of either of the lesser-included offenses of second-degree murder or involuntary manslaughter strongly supports a determination the defendant suffered no prejudice. We have followed the general rule that the jury's rejection of a greater-included offense negates a defendant's claim of prejudice due to a trial court's failure to submit an instruction on a lesser-included offense.

Id. at 299.

The court went on to state that the failure to give the lesser-included offense of assault instruction was not prejudicial because it was not inconsistent with the defendant Negrete's theory of defense, he was not relying on simple assault as a theory of defense. Id.

In our case, the original trial jury did not come in with the lesser-included offense of second-degree arson. Farrand cannot complain that he was prejudiced because it was not his theory of defense that he

was guilty of second-degree arson as opposed to first-degree arson. His theory of defense was that of alibi--that he did not commit the crime and was not present when it happened.

Perhaps the most cogent reason for agreeing with the trial court in these postconviction proceedings and not finding ineffective assistance of counsel in the original trial is the fact that even if requested under our facts, it would likely be inappropriate for the trial court to have submitted the included offense of arson in the third degree.

A comparison of the Iowa Criminal Jury Marshaling Instructions for arson in the second degree and arson in the third degree indicates that there is primarily one different element as between the two marshaling instructions. This differnce has to do with the value of the personal property. In arson in the second degree, the value of the personal property has to exceed $500, and in the arson in the third degree, the value of the personal property has to be a value of $500 or less. There is also a caveat, however, that indicates that that particular element should only be used if personal property is involved.

In our fact situation, the Moletov cocktail was thrown against the side of the house, damaging real property and did not involve personal property of any particular amount above or below $500. In other words, under our particular fact situation, it would be inappropriate to give an

instruction for arson in the third degree and so obviously there can be no prejudice by failure to request it in the original jury trial of the underlying case herein.

Finally, in State v. Royer, 436 N.W.2d 637, 644 (Iowa 1989), the defendant's conviction was reversed and a new trial ordered where the trial court failed to submit two lesser-included offenses in an arson in the first degree trial. The included offenses were arson in the second degree and reckless use of fire. Id. Notably, in reversing the decision in Royer, the court did not indicate that an additional lesser-included offense of arson in the third degree should have been submitted to the jury. Id.

Basically, our fact situation is not that much different than was the case in Royer, and there the court held that the appropriate lesser-included offenses did not, of necessity, include submission of the crime of arson in the third degree.

Based on all the foregoing, we find that the original trial counsel's failure to request submission of the included offense of arson in the third degree or to object to the trial court's failure to give it was not indicative of ineffective assistance of trial counsel.

**AFFIRMED.**