



©iStockphoto.com/gabyjalbert

No Defense

Gerald T. Hendrickson

“Harold, why the hell do you want a jury trial? You’ve got no defense.”

“Well, judge, my client refuses to plead guilty.”

“What kind of answer is that? That’s why he hired you, to tell him when he has no defense.”

“I told him that. But if he gets another conviction he’ll lose his license. So, he won’t plead.”

As we sat in his chambers, I listened to Judge Farrin Farnsworth work over Harold Tschida, carefully hiding my glee. The judge had worked me over before plenty of times before. Instead of sympathy, however, I felt perverse pleasure in seeing Harold on the hot seat.

Nobody, except Tschida’s client Tom Grossman, wanted to spend all day on a Friday in June trying a “failure to wear protective eyewear” case to a jury. Judge Farnsworth in particular had better things to do.

Fishing was his passion. Every year when the lake trout were biting on Great Slave Lake in northern Canada, Judge Farnsworth spent a blissful week of non-stop angling. Today, at 3:00 p.m., a privately chartered plane was leaving Holman Field for Yellowknife, Northwest Territories, Canada, and he was going to be on it.

“Listen, Harold.” Judge Farnsworth used a calm, almost brotherly tone. “How about if I talk to him? It might help him understand the situation.”

Harold Tschida understood the situation perfectly well. He knew Judge Farnsworth’s brotherly tone would change quickly as soon as Tom Grossman looked him in the eye and refused to plead guilty. Farnsworth wouldn’t dare say, “Grossman, you don’t know shit about the law,” but the tone of the conversation would be about the same.

Tschida, of necessity, learned client control early on. When he wheedled a good deal from a prosecutor, and failed to deliver the guilty plea, a good deal wasn’t available on the next case. If he wanted to get the good deals, he had to have the reputation of getting his client to go along, and getting good deals got him more business. The clients who had bad feelings about being pressured into pleading guilty were few compared to the many who were more than happy to get off easy.

Most defendants were willing to do what they were told. Every once in a while, however, a client would come along who out of principle, or plain

stubbornness, would not plead guilty to anything. In this case, Grossman had seemed reasonable enough, so Tschida was surprised, and without the large fee, when Grossman refused to plead.

Like the rest of us in the chambers that morning, Tschida, desperately wanted Grossman to plead. If he plead guilty to driving a motorcycle without protective eyewear he would get no more than a \$50 fine. He, however, would also lose his car and motorcycle driver's licenses for 30 days because it would be the third time in a year he had been convicted of driving a motorcycle without protective eyewear. No big deal.

On the other hand, if they went to trial and lost, he would still lose the licenses, and could end up with some jail time to boot. Judge Farnsworth had already made this clear.

"You know Harold, if this Grossman goes to trial, and the jury finds him guilty, there may be grounds to conclude he perjured himself. I doubt the county would institute charges, but I would be obligated to take that into account in my sentencing."

The message was clear, they better win if they went to trial.

That was all Tschida needed, a client going to jail for a minor traffic matter. Grossman would be doubly pissed and would bad mouth Tschida all over the East Side. It would take months for the hubbub to die down. In the meantime, the flow of clients would slow. How much? He didn't know, but even a minor drop would hurt.

And, Judge Farnsworth was right. Grossman had no defense. The police had seen him driving his maroon and cream Harley Electro-Glide down Minnehaha Avenue near the Strohs' Beer plant. Admittedly, his sunglasses were on his forehead, not over his eyes. He claimed that just before the police saw him, he had raised his sunglasses to wipe a gnat from his eye. Whether that was true, or whether he always wore the sunglasses on his forehead so he could pull them down when he saw the police, made no difference. He had driven his motorcycle without the protective eyewear over his eyes. Guilty, pure and simple. He had no defense.

Grossman sat in the courtroom and waited while Tschida and I listened to Judge Farnsworth's grumbling in chambers. Tom Grossman loved motorcycles and had owned and driven them for 20 years. He thought the helmet and eyewear laws were a pile of crap. The best part of riding was the feel of the wind going over his face and through his hair. No one had the right to take that from him.

At the arraignment and again at the pre-trial conference, he went downtown to the City Hall and County Courthouse to appear in court with his lawyer. Tschida each time told him that two judges, Farnsworth and Martinez, drove motorcycles and neither thought much of the helmet and eyewear laws. After the pre-trial conference Tschida left the courtroom and went to the Clerk of Court to get a trial date. There, Tschida talked and joked with a heavysset, middle-aged woman named Ruth Johnson who scheduled the trials.

“How does May 25th sound, Harold?” the woman asked Tschida. “It’s Judge Boyle.”

“I have a conflict, Ruthie” he replied. Even though he had nothing else on his calendar that day, this was not a total lie, because he did have a conflict. Pleading in front of “hanging” Judge Boyle conflicted with good sense.

“How about June 4th. It’s a Friday with Farnsworth.” Ruthie, like every one else in the system, knew no judge wanted to start a case on a Friday. It wrecked havoc with the jury pool, the judge assignments, and the weekend plans. She liked Harold Tschida and had dated his older brother when they were in high school. Somebody had to get the better court dates. Why not a good guy like Harold?

As Tschida took Grossman from the clerk’s office and walked into the hall to get an elevator, he said, “Alright! We’re in business! Your trial is set for June 4th before Judge Farnsworth. He rides cycles himself. I’ve often seen him be more than fair on this kind of case. We should be able to get a very favorable disposition.”

Tschida never asked Grossman whether he would plead guilty; the benefits of pleading to Judge Farnsworth were so obvious. He also didn’t notice the funny look Grossman gave him as the bronze elevator doors closed.

Tom Grossman couldn’t quite figure out what Tschida was talking about. Maybe “favorable disposition” meant the judge would throw the case out. At any rate, he had no intention of pleading guilty. The police had been jacking him around on this eyewear stuff long enough. At 9:00, on the fourth, Grossman and Tschida met at the 13th floor courtroom of the Honorable Farrin M. Farnsworth.

Tschida and I talked with Judge Farnsworth in his white oak panelled chambers. A \$50 fine and the conviction would have to go on Grossman’s record. That meant that his license would be suspended for 30 days. Tschida left the chambers to talk with Grossman in the courtroom.

Tschida’s lips were pursed and his brow furrowed when he came up to me at 10 and said, “He won’t take it.”

“Why?” I asked.

“He doesn’t want to lose his license.” Tschida replied.

“You get to tell Farnsworth,” I said as we headed back into the chambers.

After Farnsworth offered to “help” Grossman understand the situation, Tschida was in a fix. Grossman could cause problems if he didn’t plead, but Tschida couldn’t let Farnsworth try to extort a plea from him. Grossman was his client after all. He couldn’t let the judge use his position to try to coerce Grossman into doing something he adamantly refused to do.

“Judge, I appreciate that you want to take the time to help Tom sort this out,” Tschida said carefully. “I am afraid that Tom might take it the wrong way, though. He just might refuse to plead out of cussedness.” He did not think it wise to call Farnsworth a bully to his face.

“Cut the crap, Harold.” Judge Farnsworth snapped. He was no fool and he was in no mood for genteel repartee.

Tschida thought, the hell with it, so he replied, “You know very well you have no right to pressure a defendant into pleading guilty. It’s my job to protect him. So I am not bringing him in here. You may as well call the jury.”

“I will,” said the judge, his face flushed and his glare steely cold. “But remember: He has no defense.”

Well, here we go, I thought. I had no desire to go to trial either. I had done two jury trials this week already. Minnesota winters are long and make me appreciate a warm June day. Grossman’s case was my last for the week. If he would plead, I could get to Highland Golf Course before noon and tee off before the week-end rush.

Today, I wanted to get out early and have a relaxed round. Grossman stood directly in my way. Picking the jury would take an hour or two. Testimony from the only two witnesses, Officer Winslow and Grossman, couldn’t possibly take more than an hour. Throw in another hour for delays and arguments. The jury couldn’t get the case until after lunch, probably not before 2:00. If they convicted quickly, I could still get out by 3:00, probably too late to beat the rush, but better than nothing. If the jury took their time—I could miss my round all together.

All this over a petty little traffic violation! I could care less if Grossman got \$50 or 50 years as a sentence. For that matter, as far as I was concerned, he could go scot-free. He was going to go on riding his cycle without protective eyewear no matter what happened in court. Somehow the republic would survive.

I told Officer Winslow what was going on. He was sitting in the courtroom on the opposite side from Grossman, the only ones left there. Winslow was a good cop. His arrests did not involve unexplained injuries to the suspect. He worked days, which meant he would be more than happy to sit in court all day and do nothing. It was better than taking the risk of some screwball shooting you on the street.

When Winslow heard the case was going to trial, he shrugged his shoulders and said, “Whatever. What’s his story?”

“He’s got no defense,” I replied.

Winslow looked to me to be a bit irritated. A thought passed through my mind that Grossman, who had proved himself very unreasonable so far today, might have lipped off to Winslow during the stop, which would also explain this irritation. If Winslow had responded in kind, well that would explain Grossman’s stubbornness.

Winslow hadn’t mentioned anything like that when we discussed the case that morning, but the cops sometimes forgot to mention things like that. The messy details usually came out during the trial. This frequently explained why some obviously guilty traffic offender obstinately refused to plead guilty.

By 10:30, the jury panel was seated in the courtroom. I was not concerned about who was on the jury. Grossman would testify that he only lifted his sunglasses to get the bug out of his eye and Farnsworth, in his black robes, on the dias, with the flags around him, and looking very stern, would instruct the jury that removing the eyewear for that reason is not a defense to the charge. Case closed. Grossman's mother would feel compelled to vote for conviction.

I was the first to question the panel. Tschida settled into his chair to get comfortable for the duration of my questioning. Judge Farnsworth leaned over to talk to his clerk about calling the air service at Holman Field. Grossman, sitting behind Tschida, just stared at the counsel table. They were all finding ways to deal with the tedium they expected from my questioning.

Thus, they were all startled when I stood up and said, "Your Honor, I observed this panel and listened to them as they answered your questions. I am confident that any of these citizens, once they have heard the facts of this case, will render a true and just verdict. I accept the whole panel and have no additional questions."

Tschida stared at me in disbelief. No one had ever done such a thing in any trial he was in, not even in any trial he had ever heard of. He told me later he was going to write out his questions while I was asking mine. He was totally unprepared. Judge Farnsworth looked equally surprised.

I figured it was an open and shut case, and anybody really would convict on these facts. I wanted to move it along. My questioning really wouldn't add anything. Judge Farnsworth obviously was anxious to get this over with, so he might be even more inclined to my case if I cut things short. Besides, I would still get to use my three pre-emptory strikes if Tschida's questions turned up any real problems.

And, I had heard that the old-time lawyers pulled this sort of grand-standing stunt and I always wanted to try it. The way I saw it, this was as good a time as any, and better than most.

Harold Tschida stumbled and mumbled through the first few questions of his voir dire examination. Though unprepared and startled, he was still an experienced pro, so he recovered quickly. In a few minutes he got into the flow and turned on the charm.

Grossman was another matter. Tschida had given him a pen and a yellow note pad so he could take notes and pass on messages. In his boredom, as he sat behind his attorney, he took to doodling on the fly of the faded jeans he wore. I could see a couple of the jurors roll their eyes as they caught this act. It would be the first topic of discussion in the jury room when they finally retired to consider their verdict.

"Just keep it up, pal," I thought, "and I'm out of here by 3:00."

Once Tschida finished, Judge Farnsworth had us make our pre-emptory strikes. We ended up with the necessary jury of six: two men and four women. None owned a motorcycle. Ever.

The judge called his court reporter to come to the courtroom and start to make the record. Then, he looked at me and said, "You may proceed, counsel."

My opening statement to the jury was brief. Hell, the whole case was only going to take a half an hour to an hour. No point in insulting the jury's intelligence by rambling on in the opening.

When I finished, Judge Farnsworth looked at Tschida. You could see it already. Even though Farnsworth put on the impartial judge act for the sake of the jury, when you looked in his eyes, as he looked down at Tschida, the venom was unmistakable.

"I'll reserve my opening," Tschida said.

He was up to something. Defense lawyers give their opening statements right after the prosecutor if they want the jury to hear their side of the case early on, before they start to form opinions. However, if a defense attorney thinks he can surprise the prosecution with some evidence, he won't give his opening statement until the prosecution has rested. Tschida had to figure that he was going to get something good out of Officer Winslow, and he did not want to tip his hand to either of us. For the first time that day, I felt a little uneasy.

"You may call your witness, counsel."

"The state calls Officer Jeffery Winslow."

Winslow came forward and stood in the witness box. He was still in his uniform, of course. He had testified perhaps hundreds of times before. He knew right where to go and where to stand while he was sworn in. He knew to look the jury, not me, when he answered his questions, especially at the key points.

Officer Winslow was sworn in; he sat down, stated his full name and spelled it for the record. He answered the questions. He is a police officer; has been for twelve years; in the patrol division; working days in the East Team, which is basically St. Paul east of downtown. Yes, he was on duty, in uniform, driving a marked squad on or about 10:30 on the morning of April 27. And yes, at that time he was on patrol in the vicinity of the intersection of Minnehaha and Arcade Avenues, in St. Paul, Ramsey County, Minnesota.

And, what did he observe at that time and place? Well, he was stopped for the red light northbound on Arcade and he saw a maroon and cream Harley Davidson Electro-Glide motorcycle coming from his right, westbound on Minnehaha, and the driver of the motorcycle did not have a windshield nor any eyewear.

And, what did he do? Well, he followed the motorcycle and stopped it at about Payne Avenue, near the Stroh's brewery.

And, does he see the driver of that motorcycle in court today? Why yes he does. It's the gentleman sitting behind the defense attorney.

I had no further questions. It was almost noon. Judge Farnsworth adjourned the proceedings and told everyone to be back at 12:45. He must really be in

a hurry about something, I thought. He, of course, hadn't told us about the fishing trip. Judges rarely call a jury back before 1:30, and never give them less than an hour for lunch.

*

Judge Farnsworth was in a hurry. When his clerk called the charter service, he learned that bad weather was coming in. Not only could they not delay the flight for him, it had been moved up to 2:30 that afternoon. If he was not there then, it would be Sunday before the weather cleared enough for the flight. On top of that, the best fishing of the week would be before the storm.

That settled it. If he left the courthouse at 2:15, he could be at the hangar by 2:30. He called his wife to bring his luggage directly to the hangar from home.

All that remained was to conclude this case. So far, so good. He would get the jury back by 12:45. If Tschida was reasonable, they could finish the cross-examination by 1:00, finish Grossman by 1:30, finish arguments and instructions by 2:00. That only gave the jury 15 minutes to deliberate. Pretty short, but with this type of case, it might be enough. He could always get another judge to take the verdict.

He called the clerk and found out the only judge available was Judge James Hoover. Hoover was notorious for shirking work. Farnsworth, many times, had to pick up cases for Hoover when he called in sick or left early. The rumor was Hoover was drinking too much. At one point, Farnsworth had it out with Hoover about having to carry the load for him. The two had bad feelings towards each other ever since. Farnsworth would rather be stuck in family court for the rest of his life than let Hoover get the pleasure of picking up some of his work so he could leave early. He decided that the case would be done by 2:15.

*

I had a pleasant, if short, lunch, blithely unaware of all this.

At 12:45 everyone was back in their seats. Tschida began his cross-examination of Winslow.

"Officer Winslow, do you recall having any conversation with Mr. Grossman after you stopped him?"

"I asked him for his license. Told him I was going to tag him. The copy of the tag he gets has the address and phone numbers of the clerk of court. I showed him those and told him to contact the clerk within 10 days, or a warrant would be issued."

"Were any other officers present during the stop of Mr. Grossman?"

"No."

"Do you recall anything else about your conversation with Mr. Grossman?"

"Mr. Grossman seemed upset about the ticket and was insulting to me."

“Do you recall the specifics of what he said?”

“Something about what got me out of the Donut Hut.”

Some of the jurors snickered.

“Did you insult him in return?”

“No.”

“Do you recall specifically what you said to Mr. Grossman?”

“No.”

I knew we were in for some trouble now. I guessed Grossman was going to testify in detail about a conversation, making Winslow look bad. Winslow, by saying he didn't recall, had just given away any chance of countering what Grossman would say.

When Tschida finished his cross-examination, I rested my case. Tschida waived his opening and put Grossman on the stand. Grossman admitted driving the motorcycle and being stopped by Winslow. He told the jury that he had been wearing his sunglasses, but just before Winslow saw him, he got a bug in his eye. He pushed the sunglasses up on top of his head and wiped the bug out of his eye. Before he knew it, Winslow was behind him and pulled him over.

“What did the officer say to you when he walked up to you?”

“He said, ‘Gotcha now, asshole.’”

That got the jurors attention.

“He used those specific words?”

“Yeah.”

“What did you say?”

“I said, ‘Little early to be this far from the Donut Hut, isn't it?’”

“Had you any dealings with Officer Winslow before this stop?”

“No.”

“Then what happened?”

“That officer went back to his squad and used his radio. I sat on my bike. When he came back and gave me the ticket, another squad car pulled up.”

“What happened then?”

“The second officer rolls down his window. He is laughing and he says to me, ‘Seems like you have a problem, dirt ball.’”

“Objection,” I sputter. “Hearsay. Move to strike the last part of that answer.”

“Sustained,” Farnsworth mumbled.

A lot of good it did me.

A couple of the jurors were glaring at Winslow.

“Did you know the second officer?” Tschida went on.

“Didn’t know him, but I had seen him before. He stopped me on my bike before a couple of times, but never tagged me.”

“Officer Winslow testified that you seemed upset. Were you?”

“You bet.”

“Why?”

“Cops are always pulling me over, hassling me. I’m no crook, but they’re always giving me a bad time. Then this one calls me an asshole, excuse my French, but it’s what he called me.”

“Your witness,” Tschida said. He caught my eye, and in that instant I could see he was pretty pleased.

My cross-examination was pretty short. I baited him a little bit and he got angry with me. At least the jury could see that it didn’t take much to get him angry.

When Tschida rested, Winslow came up to me and whispered in my ear, “I remember now! Put me back on the stand.”

Great, he wanted to go back on the stand, under oath, and change his story. That would be great for his credibility. Tschida would eat him alive. On top of that, it was almost 1:30.

I put him on again. Winslow denied calling Grossman an asshole. He said that he now remembers the other officer, Officer Brown, pulling up, but Brown didn’t say anything to Grossman.

Tschida made his cross short and to the point.

“Officer Winslow, half an hour ago, you did not even remember that Officer Brown stopped at the scene, right?”

“I forgot.”

“Now, you are sure he did.”

“Yes.”

“And you are sure he did not say anything to my client.”

“Yes.”

“Just as sure as you were when, under oath, only a half hour ago you told this jury he was not even there.”

“Well, Mr. Grossman’s testimony refreshed my recollection.”

Cops tend to pick up the courtroom jargon.

“And you are sure you didn’t call my client a foul name.”

“Yes.”

“Just as sure as you were when you wrongly testified that Officer Brown wasn’t at the scene.”

“I had forgotten that, but now I am sure.”

The testimony ended at 1:40. I was still confident, because Grossman had admitted the offense, and because Farnsworth would instruct them that the

bug story was not a defense. But some of the jurors would be upset with the police officers. Winslow came off as not really remembering anything, so Grossman's story could be true. Jurors don't like police to be overbearing. Grossman came off as a hot head, but a harmless one. The conflict between the facts and the emotions meant that this jury could be out for several hours, maybe until tomorrow, trying to resolve matters. Well, I could kiss off my golf game.

Judge Farnsworth was going through the same mental calculus. He knew he had to move this case along to have any chance of making his flight.

The judge had a short recess and talked to the lawyers in his chambers. He told us to keep it short because he had some other matters this afternoon. He wanted to instruct the jury at 2:00.

"What!" I was startled. That only gave the lawyers about five minutes a piece for their closing arguments. "You can't be serious."

"You already have used most of a day on this. There were only two witnesses. The jury is not stupid. You only need five minutes to some this up. They won't listen any longer than that anyway."

"This is unfair judge. I want to object on the record," I replied.

"Fine," Judge Farnsworth said, as he walked out of the chambers. "It comes out of your five minutes."

Back in the courtroom, I made my objection at the side bar. Tschida piped in, "The defendant objects as well," so I guess he only lost two or three seconds.

The lawyers and the court reporter took their seats. Judge Farnsworth looked at me and said, "You may proceed."

And make it snappy, I mentally added.

"Members of the jury," I began. "This is a very simple case. You heard it all today, so I'll not bore you and drag this out."

Without looking up from the papers on his bench, Judge Farnsworth smirked.

"The defendant admits that he was riding his motorcycle at the time and place charged. He admits that he took off his eyewear. The judge will instruct you that the law requires all who drive motorcycles to wear protective eyewear at all times, and that taking the protection off the eyes, for any reason, even to wipe out a bug, is no defense. On these facts you should convict."

"There is some conflict in the evidence," I carefully went on, "about what happened after the stop. None of that, however, changes what happened before the stop. If you should believe what Grossman says, and we urge that you do not believe him, but if you do, he is still guilty as charged."

I sat down.

Tschida went to work. I have heard his final argument two or three times, and it is pretty good. Rights of the individual, powerful, oppressive government. Going back to King George. Scales of Justice. The whole thing. He gave a

shortened version that lost nothing in its force. Don't let the bad guys win. He never even mentioned motorcycles or eyewear.

2:00. Farnsworth started in on the instructions. His standard instructions, which are the same as those of all the other judges, is a boring litany of rules designed to keep the Supreme Court from reversing a case, not to instruct a jury. Fine, I thought. Bore them, tell them there's no defense, and send them out to haggle for a while.

I was flabbergasted then, when, instead, Judge Farnsworth addressed the jury, "Members of the jury, your duty is to deliberate and reach a just and true verdict upon the facts and law that you have heard today. To get to the point, the elements of the offense charged are that on the date and time charged, Thomas Grossman operated a motorcycle, and while so doing he did not wear protective eyewear. However, taking the protection off the eyes, to wipe out a bug, is a defense. If you so find, you should acquit Mr. Grossman."

Judge Farnsworth just made me a liar to the jury.

All the jurors looked at me.

I didn't even hear the rest. What was he doing? He knew damn well what the law was. My mind fogged over, and I stared blankly around the room, trying to avoid the steely gazes from the jury box.

The jury left, but returned before I could gather my papers and leave my seat. At 2:15, Thomas Grossman was acquitted of the charge. Judge Farnsworth didn't even take the time to thank the jurors for their service. "Court's adjourned," he said as he pounded his gavel and hurried out of the courtroom. Grossman smiled and shook Tschida's hand. The jurors filed out of the courtroom. Juror One, the retired guy from Whirlpool, slipped me one last dirty look as he walked by me.

I went back to my office to call Officer Winslow. He had left the courtroom as soon as Tschida was done humiliating him. Had I looked out my window I would have seen Judge Farnsworth's plane taking off from Holman Field as I broke the news to Winslow.

"What?" Winslow responded when I told him the verdict. "I thought you said he had no defense?"