IN THE COURT OF APPEALS OF IOWA

No. 6-095 / 04-1036
Filed April 26, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

OWEN F. BENSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Judge Gregory A. Hulse.

Defendant Owen F. Benson appeals convictions first-degree arson and third-degree harassment. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Linda Del Gallo, State Appellate Defender and David Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Wayne Reisetter, County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Mahan, JJ.

SACKETT, C.J.

Defendant, Owen F. Benson, appeals convictions for first-degree arson, in violation of Iowa Code sections 712.1 and 712.2 (2003), and third-degree harassment, in violation of Iowa Code sections 708.7(1) and 708.7(2). Defendant contends (1) there was not sufficient evidence to support the first-degree arson conviction or the harassment conviction, (2) the district court erred in refusing to allow him to discharge an attorney he privately retained, (3) the district court should not have overruled his motion for a new trial, (4) his trial counsel was ineffective, and (5) the district court should not have extended a protection order as a part of his sentence. We affirm in part, reverse in part, and remand.

I. BACKGROUND FACTS AND PROCEEDINGS.

Defendant was accused of attempting, on July 24, 2003, to set fire to or blow up a house that defendant and his former wife Angela Benson owned at 2720 Northwest 145th Street in Urbandale, Iowa. Additionally, defendant, who was residing in the house, was accused of harassing Angela when she came there on July 14, 2003.

The Benson marriage was dissolved in June of 2002. During the pendency of the proceedings Owen remained in the home and was still living there on July 24, 2003. According to Angela's testimony they were to sell the house and divide the proceeds from the sale equally. Angela was responsible for seeing that the house was sold. Angela testified she phoned defendant and left messages for him almost daily from June 23 to July 8, 2003, in an effort to gain entry to the house and prepare it for sale. She did not get a response from

defendant, so on July 8, 2003 Angela went to the house with a locksmith while defendant was not at home and had the locks changed. She kept a key to the house, left one key with a third party, and left messages for defendant telling him he could pick up the key from the third party. Defendant testified that he did not know Angela was going to be at the house on July 8.

On July 14, 2003, Angela again went to the house to do some work on it, such as filling holes in the walls and painting. Defendant testified he was not aware Angela was going to be at the house on July 14. Before going to the house she called the Urbandale police to ask them to assist her in gaining access to the house. Before the police arrived Angela spoke to defendant in the driveway about the need to do work to prepare the house for sale, but defendant denied her access to the house. A police officer arrived and informed defendant he had to let Angela into the house. Angela entered the house and came back out within minutes and told the officer that defendant had threatened to kill her. Police spoke to defendant and asked him if he made any threats. He denied making any. The officer asked defendant to leave the house but defendant refused to do so. Angela reentered the house again but left again. An exchange occurred between police and defendant. Angela again reentered the house and worked without further incident.

Angela and her real estate agent both testified that leading up to July 24, 2003 they left numerous messages with defendant telling him they needed his signature on a listing agreement. Defendant testified he had no idea Angela or anyone else would be coming to the house on July 24, 2003. The State did not introduce evidence indicating anyone had told defendant he or she would be at

the house on July 24. However, on July 24, Angela arranged for her realtor, a locksmith,[1] and a police officer to meet her at the house. Angela approached the front door with the police officer and unlocked the door with a key she obtained from her daughter. The odor of natural gas was immediately evident. The police officer instructed Angela to step away from the house and he went inside. The officer found a lighted candle on the basement steps and he extinguished it. The locksmith shut off the gas on the outside of the house. It subsequently was learned the end cap had been removed from the natural gas line serving the water heater.

Defendant was arrested on July 25, 2003 in Sioux City, Iowa. He was charged by trial information with first-degree arson, a class B felony, and first-degree harassment, an aggravated misdemeanor. Defendant denied the charges and presented an alibi defense. A jury found him guilty as charged.

II. SUFFICENCY OF THE EVIDENCE.

Defendant challenges the sufficiency of the evidence on both convictions. The State concedes error was preserved.

Defendant contends the evidence was not sufficient to support a conviction of first-degree arson. We review challenges to the sufficiency of the evidence for errors at law. Iowa R. App. P. 6.4; *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). A jury's verdict is binding if supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). Substantial evidence is evidence that could convince a rational fact-finder that the defendant is guilty beyond a reasonable doubt. *State v. Kirchner*, 600 N.W.2d 330, 334 (Iowa Ct.

[1] Angela testified that she assumed defendant had changed to locks and she sought to change the locks once more so that she would be able to access the house.

App. 1999). We consider all record evidence not just the evidence supporting guilt when we make sufficiency of the evidence determinations. When reviewing the sufficiency-of-the-evidence we review the record in the light most favorable to the State. *See State v. Milner*, 571 N.W.2d 7, 10 (Iowa 1997). We uphold a verdict if substantial evidence supports it. *Id*.

Defendant first contends there is not substantial evidence that he was the perpetrator. To place defendant near the home on the afternoon of July 24, 2003 the State relied on the testimony of Jayne Miller who lived two doors down from the Benson house. Miller testified she saw defendant dressed in a black t-shirt, black gym shorts, and wearing black gloves, walk away from his house between 2:45 and 3:00 that afternoon. Miller said she took notice of the defendant because she thought it was peculiar he was wearing black gloves. This testimony contradicted defendant's testimony that he left Urbandale to go to Sioux City earlier that afternoon after buying gas, having lunch and returning two rented DVDs. Defendant claimed he arrived in Sioux City between three and four o'clock that afternoon. He points to evidence that he made two calls from Sioux City at about 5:44 pm that day. Two witnesses testified to the driving time to Sioux City, specifically from defendant's house in Urbandale to the home of defendant's mother Ruth Kinnaman in Sioux City. One said driving the speed limit it could be done in three hours and twelve minutes and another said two hours and forty-five minutes.

Defendant contends Miller misidentified him, that she did not know him well, that she saw the person from a distance, and that mostly she saw the person from the back. Defendant also contends Miller's testimony is not

sufficient because Angela had access to the house and appeared there with witnesses to find the gas open and the candle lit.

We conclude the evidence was sufficient for the jury to find that defendant was the perpetrator of the crime. Defendant had access to the house and he was living in it at the time. Additionally, Miller's testimony placed defendant near the home on the afternoon of July 24, 2003. Miller testified she knew the defendant well enough to be able to recognize him. As to her previous encounters with defendant she testified (1) she first met defendant in his driveway in 2001; (2) she observed defendant mowing his yard, washing his truck, and playing catch with his daughters; (3) she once went to defendant's house to deliver a message and he answered the door; and (4) she had a fifteen-to-twenty minute conversation with defendant while she was caring for his next-door neighbors' yard. Furthermore, Miller's testimony that defendant was leaving the house between 2:45 and 3:00 pm the afternoon of July 24 is consistent with the only definitive evidence as to the time defendant arrived in Sioux City. Defendant's cell phone bill indicated he made a call from Sioux City at 5:44 pm and testimony indicated that one could drive from Urbandale to Sioux City in two hours and forty-five minutes.

Defendant next contends that even if the evidence was sufficient to show he was the perpetrator, it was not sufficient to prove he was guilty of first-degree arson because the evidence does not show he could have reasonably anticipated that one or more persons would be present at the home when it would have caught fire or exploded.

Iowa Code section 712.2 defines first-degree arson.

> Arson is arson in the first degree when the property which the defendant intends to destroy or damage, or which defendant knowingly endangers, *is property in which the presence of one or more persons can be reasonably anticipated*, or the arson results in the death of a fire fighter.

(Emphasis added.) Key to the present case is whether defendant could have reasonably anticipated the presence of the one or more persons in the property where the arson was perpetrated. To resolve this issue we must construe what the legislature meant by this statute. Our courts have not previously contemplated this particular part of Iowa Code section 712.2.

Our general principles of statutory construction apply in determining how this particular language should be construed.

> (1) In considering legislative enactments we should avoid strained, impractical or absurd results.
> (2) Ordinarily, the usual and ordinary meaning is to be given the language used but the manifest intent of the legislature will prevail over the literal import of the words used.
> (3) Where language is clear and plain, there is no room for construction.
> (4) We should look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it.
> (5) All parts of the enactment should be considered together and undue importance should not be given to any single or isolated portion.

American Home Products v. Iowa State Bd. of Tax, 302 N.W.2d 140, 142-43 (Iowa 1981).

The State urges that we should broadly interpret the language of section 712.2, such that the statute is satisfied if defendant could have reasonably anticipated anyone being on the land on which the house was situated and within the zone of danger created by a possible explosion of the house. The State believes it was sufficient to show that defendant could have reasonably

anticipated a person would have been walking on the sidewalk in front of his house at the time the house exploded, or that defendant could have reasonably anticipated construction workers walking across his property from job-to-job in this new housing development at the time the house exploded, or that defendant could have reasonably anticipated an explosion large enough that it would have endangered people on his neighbors' property. We disagree with the State's position.

The statute specifically ties the presence of one or more persons to the property the defendant intends to destroy, in this case the house. The statutory language is clear on this point. If the evidence shows a defendant could reasonably anticipate the presence of a person *in the property defendant intends to destroy* by arson, then a conviction for first-degree arson is appropriate.

This interpretation of the statute is bolstered by the fact that the Iowa legislature amended section 712.2 in 2004.[2] The amendment changed the statute to provide that a defendant need only reasonably anticipate the presence of a person "in or near" the property subject to the arson.[3] 2004 Iowa Acts ch. 1125, § 14 (amending Iowa Code § 712.2). We conclude that the subsequent amendment of the statute provides some illumination as to how the previous statute should be interpreted. That is, because the legislature amended the statute to explicitly incorporate the situation of people being "near" the property,

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[2] The amended Iowa Code does not apply to the present case as the arson was committed in 2003.

[3] Iowa Code section 712.2 now reads as follows:

> Arson is arson in the first degree when the presence of one or more persons can be reasonably anticipated in or near the property which is the subject of the arson, or the arson results in the death of a fire fighter, whether paid or volunteer.

2004 Iowa Acts ch. 1125, § 14 (amending Iowa Code § 712.2).

the previous statute that did not include the "near" language clearly did not contemplate that it was enough for someone to simply be near the property of the subject arson.

Applying our interpretation of the statutory language to the present case, we conclude there was not sufficient evidence to convict defendant of first-degree arson. There was little evidence in the record to indicate defendant could have reasonably anticipated someone in the house on the afternoon of the arson. Defendant was the sole resident of the house. Also, defendant had apparently changed the locks to the house subsequent to Angela changing the locks, as Angela testified that she was only able to unlock the door to the house with a key that she obtained from her daughter. Defendant did know Angela had come to the house with a locksmith and changed the locks on July 8, 2003, a couple of weeks prior to the arson. However, Angela testified that she called "almost every day" for a couple of weeks prior to entering the house with the locksmith, and she left messages that she needed to "make arrangements to get the realtor in." She also testified that she left a message on defendant's mother's answering machine stating, "Owen needs to make arrangements to get a realtor in the house." While Angela made it clear that she needed to get into the house leading up to July 8, 2003, when she gained entry with a locksmith, the evidence does not show that she told defendant that she needed to get into the house leading up to July 24, 2003. Instead, Angela and the real estate agent both testified the messages they left leading up to July 24, 2003 were to inform defendant they needed to meet with him in order to get his signature on the listing agreement. These messages indicate a need for a face-to-face meeting,

not a need to enter the house. There is no evidence to indicate that anyone told defendant that he or she needed to enter the house on July 24, 2003 or any other day in late July.

The evidence presented by the State was insufficient to show that defendant could have reasonably anticipated the presence of one or more persons in the house on July 24, 2003. Therefore, we reverse defendant's conviction for first-degree arson.

The offense of second-degree arson in violation of Iowa Code section 712.3 was submitted to the jury as a lesser included offense. The jury did not reach a verdict on that offense because it found the State had established all elements of the greater offense. In so doing, the jury necessarily found the State had established all elements of the included offense. In such instances, where we have determined that an element exclusive to the greater offense was not sufficiently proved, it is appropriate to enter an amended judgment of conviction with respect to the lesser included offense. *State v. Morris*, 677 N.W.2d 787, 788-89 (Iowa 2004); *State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999); *see also State v. Lampman*, 342 N.W.2d 77, 81 (Iowa Ct. App. 1983). We order that this be done following remand in the present case. Defendant shall then be resentenced.

We next address defendant's contention that there was insufficient evidence to prove third-degree harassment.

Iowa Code section 708.7(1)(b) provides:

> A person commits harassment when the person, purposefully and without legitimate purpose, has personal contact with another person, with the intent to threaten, intimidate, or alarm that other person. As used in this section, unless the context otherwise

> requires, "personal contact" means an encounter in which two or more people are in visual or physical proximity to each other. "Personal contact" does not require a physical touching or oral communication, although it may include these types of contacts.

The harassment charge stemmed from the July 14, 2003 incident when Angela arrived at the house to do painting and other repairs and a confrontation ensued between defendant and Angela. Angela had called the police that day to obtain their assistance in gaining access to the house. Before police arrived, Angela was denied access to the house by defendant. After the police arrived, defendant let Angela into the house but she claimed that as soon as she got into the house defendant threatened her by saying, "There's not going to be anything left after this. . . ." and "I'm going to fucking kill you. Somebody is fucking going to get murdered over this. I'm going to fucking kill you." Angela testified that she immediately left the house after the threats were made and informed the police. One of the police officers testified that Angela left the house shortly after entering and told him defendant threatened her. The officer testified Angela was shaky and visibly upset.

Defendant's first contention is that Angela is not a credible witness and he argues she knew her problems with him over the property division would be easier if he were incarcerated. He also contends her statements were contradicted by her subsequent actions in remaining in the house with him for several hours.

The jury was free to believe or disbelieve any testimony and to give as much weight to the evidence as, in its judgment, such evidence deserved. *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). The evidence was sufficient to support a finding that defendant threatened Angela. Statements giving rise to a

harassment prosecution, in which defendant threatened to blow detaining officer's brains out and subsequently made another shooting reference after stating that "I'm gonna remember you," were not protected speech under the First Amendment; statements were not expressions of political opinion and had no legitimate purpose. *Button*, 622 N.W.2d at 480.

Defendant further argues the State has failed to show his contact with Angela was "without a legitimate purpose." He points out he did not initiate the contact; rather she did in coming to the place where he resided. He contends the district court incorrectly determined that the fact he chose to make threats and the threats had no legitimate purpose brought his acts within the statute.

We agree with the defendant that it was Angela's action that put the parties in close proximity of each other. She initiated the personal contact. However, the statute provides words can be a personal contact. The jury could have found the words defendant used were "without a legitimate purpose." "Because there must be a specific intent to threaten, intimidate, or alarm, the only legitimate purpose that will avoid the criminal status conferred by the statute would be a legitimate purpose to threaten, intimidate, or alarm." *State v. Evans*, 672 N.W.2d 328, 331 (Iowa 2003); *see also Button*, 622 N.W.2d at 484-85. We affirm on this issue.

III. SIXTH AMENDMENT CLAIM.

Defendant next contends he should have been allowed to discharge his privately-retained attorney. Our review is for an abuse of discretion. *State v. Tejeda*, 677 N.W.2d 744, 749 (Iowa 2004); *State v. Martin*, 608 N.W.2d 445, 449 (Iowa 2000). As there is an underlying constitutional issue we review de novo to

the extent of determining whether an abuse of discretion occurred. *State v. Thompson*, 597 N.W.2d 779, 782 (Iowa 1999).

To establish an abuse of discretion, defendant must show that "the court exercised the discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). The Sixth Amendment right to counsel guarantees the assistance of counsel for defense in all criminal prosecutions. *Wheat v. United States*, 486 U.S. 153, 158, 108 S. Ct. 1692, 1696, 100 L. Ed. 2d 140, 147 (1988). Yet, the purpose of the right to counsel "is simply to ensure that criminal defendants receive a fair trial." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 693 (1984)). Thus, "in evaluating Sixth Amendment claims, the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *United States v. Cronic*, 466 U.S. 648, 657 n. 21, 104 S. Ct. 2039, 2046 n. 21, 80 L. Ed. 2d 657, 667 n. 21 (1984). The right to counsel does not guarantee a "meaningful relationship between an accused and his counsel." *Morris v. Slappy*, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617, 75 L. Ed. 2d 610, 621 (1983).

Our jurisdiction's rule with regards to the substitution of counsel is clear in situations where a defendant has received court-appointed counsel and seeks substitute counsel.

> To justify the appointment of substitute counsel, a defendant must show sufficient cause. Sufficient cause includes a conflict of interest, irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant.
>
> In determining whether to grant a request for substitute counsel, the court must balance the defendant's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice. The court should not permit a defendant

> to manipulate the right to counsel to delay or disrupt the trial. Additionally, the court should not allow last-minute requests to substitute counsel . . . to become a tactic for delay. For these reasons, the court has considerable discretion in ruling on a motion for substitute counsel made on the eve of trial.

State v. Lopez, 633 N.W.2d 774, 778-79 (Iowa 2001) (quotations and citations omitted).

However, our courts have not addressed the issue present in this case: the discharge and substitution of privately-retained counsel.

On December 11, 2003, four days before defendant's trial was set to begin, defendant's attorney filed a motion to withdraw asserting defendant had terminated the attorney-client relationship. A hearing was held and defendant's attorney stated to the district court he did not believe he could effectively represent someone who does not want him and would decline to assist him. Defendant confirmed this and made a motion to discharge his attorney and obtain a continuance. Defendant told the court the two did not communicate and his attorney did not show up for appointments as promised. Defendant told the judge if his attorney was allowed to withdraw that he would either hire another attorney or represent himself.

Both defendant and the State agree the standard found in *Lopez*, 633 N.W.2d at 778-79, requiring justification prior to discharge of court-appointed counsel, should not apply where counsel is privately-retained. Instead, the State argues that the district court "must balance the defendant's right to choose his own attorney against the general interest in the prompt and efficient administration of justice." The California Supreme Court has addressed the

specific issue we are confronted with. *People v. Ortiz*, 800 P.2d 547, 552 (Cal. 1990). In resolving the issue, the California court stated as follows:

> While we have recognized competing values of substantial importance to trial courts, including the speedy determination of criminal charges, the state should keep to a necessary minimum its interference with the individual's desire to defend himself in whatever manner he deems best, using any legitimate means within his resources. A criminal defendant's right to decide how to defend himself should be respected unless it will result in significant prejudice to the defendant or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case. In other words, we demand of trial courts a resourceful diligence directed toward the protection of the right to counsel to the fullest extent consistent with effective judicial administration.

Id. (internal quotation marks and citations omitted). Thus, the California court held that a defendant may discharge his privately-retained counsel of choice at any time with or without cause. *Id.* However, the court placed some constraint on that right, stating that the trial court has the discretion to balance defendant's right to discharge counsel against the whether the discharge will result in "significant prejudice" to defendant and the State's interest "in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of assembling witnesses, lawyers, and jurors at the same place at the same time." *Id*. at 553 (internal quotation marks and citation omitted). The court further cautioned that the trial court "must exercise its discretion reasonably: a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality." *Id*. (internal quotation marks and citation omitted). The California approach spelled out in *Ortiz* has also been adopted in Oklahoma. *Dixon v. Owens*, 865 P.2d 1250, 1252 (Okla. Crim. App. 1993).

We find the Supreme Court of California's reasoning persuasive and take a similar approach in the present case. That is, the defendant had the right to discharge his counsel at will, unless a showing of significant prejudice to defendant, undue delay, or disruption of the orderly processes of justice was made.

In ruling on defendant's motion to discharge counsel and counsel's motion to withdraw, it appears the district court applied an incorrect standard. The district court held there was not sufficient evidence to show an irreconcilable conflict or breakdown in communications; requirements inapplicable where counsel is privately-retained. However, the district court's application of an incorrect standard "does not mean the court automatically abused its discretion. In our review we can determine whether the facts available to the court support the court's discretionary decision." *State v. Vanover*, 559 N.W.2d 618, 627 (Iowa 1997).

Defendant argues the district court abused its discretion because there was no showing that undue delay would result from the substitution of counsel. He argues the trial, to that point, had proceeded expeditiously, even though defendant had already been granted one continuance. Further, defendant claims there was no evidence of a public need to have the trial take place in early December; there was no allegation that defendant constituted a danger to the public. Additionally, defendant argues there was no danger that the orderly processes of justice would be disrupted by a discharge and delay. There was nothing in the record to indicate that evidence or witnesses would disappear or

become otherwise unavailable if defense counsel was discharged and the trial was continued.

The State, conversely, argues the district court did not abuse its discretion because the substitution of counsel would have caused undue delay and disrupted the orderly processes of justice. The State first contends the district court did not abuse its discretion due to the untimeliness of defendant's request for substitution of counsel. *See United States v. Franklin*, 321 F.3d 1231, 1238-39 (9th Cir. 2003) (holding that a motion for substitute counsel made six days before trial was to begin was untimely because a continuance would almost certainly be required). The motions to discharge and withdraw were made just four days before trial was to begin.

The State also argues the district court did not abuse its discretion because defendant sought the delay for the inappropriate purpose of delaying trial. *See Lopez*, 633 N.W.2d at 779 ("The court should not permit a defendant to manipulate the right to counsel to delay or disrupt the trial."); *see also United States v. Gandy*, 569 F.2d 1318, 1324 (5th Cir. 1978) (A factor to be considered in granting a defendant a continuance so that his retained attorney can take part is "whether the requested delay is for a legitimate reason, or whether it is dilatory and contrived."). The State argues the fact defendant had not previously voiced any complaints to the district court prior to his motion, four days before trial, evinces defendant's desire to simply delay trial. Additionally, at the hearing on the motions defendant was unclear in his explanation as to why he desired substitute counsel. He first claimed he did not believe the defense was ready for trial on December 15, 2003. Defendant retreated from that statement when

questioned by the district court and claimed he wanted new counsel due to communication problems with his current attorney. Yet, defendant went on to say that his attorney answered all the questions defendant posed to him. Defendant failed to provide any material examples of communication problems when asked by the district court, other than alleged miscommunication as to when he and his attorney would meet. Furthermore, defendant's attorney indicated any communication problems that did occur were due largely to defendant's refusal to cooperate and assist him. The State argues the fact defendant was impeding the work of his attorney as further evidence that defendant simply wanted to delay his trial.

Most importantly, the district court made the finding in its ruling on the motions, at least in part, defendant's "purpose of substituting counsel is to delay trial."

The above cited facts are only pertinent to the extent they indicate defendant was attempting to cause undue delay or disrupt of the orderly processes of justice. As we have previously pointed out, a defendant does not have to justify his discharge of privately-retained attorney. Instead, the burden is on the State in such instances to make a showing that defendant is attempting to cause undue delay or disruption by discharging privately-retained counsel. In the present case, we conclude that based on the evidence it was reasonable for the district court to conclude that defendant sought substitute counsel for the purpose of the delaying his trial and disrupting the orderly processes of justice. Therefore, the district court did not abuse its discretion in denying both defendant's motion to discharge his counsel and counsel's motion to withdraw.

IV. MOTION FOR NEW TRIAL.

The jury reached a verdict on December 19, 2003. Defendant, acting pro se, and defendant's attorney both filed motions for a new trial on January 5, 2004. The district court must rule on such motions within thirty days. Iowa R. Crim. P. 2.24(2)(*e*). However, on February 2, 2004, before the thirty day period was up, defendant withdrew both motions in writing. He affirmed his withdrawal orally to the district court. Defendant now claims the district court erred in failing to rule on the motions for new trial filed January 5, 2004. The record clearly reflects that defendant withdrew those motions; therefore, his claim on appeal is without merit.

Defendant filed another motion for a new trial on February 24, 2004. The district court refused to hear any of defendant's claims, except those based on allegedly newly discovered evidence, pursuant Iowa Rule of Criminal Procedure 2.24(2)(*a*), which requires that a motion for a new trial must be made within forty-five days of the verdict. Defendant argues the district court erred in overruling his motion pursuant to rule 2.24(2)(*a*). Defendant's claim is without merit.

Finally, defendant's February 24, 2004 motion for a new trial included allegations of newly discovered evidence. Such motions can be made within two years of the verdict. Iowa R. Crim. P. 2.24(2)(*b*)(8). After a hearing on the issue the district court overruled all of defendant's claims. Defendant claims the district court erred in doing so. After careful consideration we affirm the district court on this issue.

V. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Defendant contends his trial counsel was ineffective. We review ineffective assistance of counsel claims de novo. *Tejeda,* 677 N.W.2d at 754. To prevail on a claim of ineffective assistance of counsel, defendant must prove: "(1) his counsel failed to perform an essential duty, and (2) prejudice resulted." *Id*. When "'there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different,'" prejudice results. *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998).

Claims of ineffective assistance of counsel in a criminal case "need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes." Iowa Code § 814.7(1); *State v. Tate*, 710 N.W.2d 237, 239 (Iowa 2006). An ineffective assistance claim may be raised on direct appeal if the defendant "has reasonable grounds to believe that the record is adequate to address the claim on direct appeal." Iowa Code § 814.7(2); *Tate*, 710 N.W.2d at 239-40. We do not normally address ineffective assistance claims on direct appeal. *Tate*, 710 N.W.2d at 240.

> We will not, however, preserve a defendant's ineffective-assistance-of-counsel claim and we will affirm the defendant's conviction on direct appeal if the appellate record shows as a matter of law the defendant cannot prevail on such a claim. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003)). Likewise, we will reverse a conviction based on an ineffective-assistance-of-counsel claim on direct appeal if the appellate record establishes both prongs of the *Strickland* test and a further evidentiary hearing would not change the result. *Id.*

State v. Shanahan, ___ N.W.2d ___, ___ (Iowa 2006). "Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *Tate*, 710 N.W.2d at 240.

We have reviewed defendant's claims and the record before us. We conclude the record is insufficient to address the claims on direct appeal. We preserve defendant's claims of ineffective assistance of trial counsel for possible postconviction relief proceedings so that defendant and his trial counsel will have the opportunity to establish a record.

VI. SENTENCING.

Defendant challenges for the first time on appeal that part of the district court sentencing order that forbade defendant to have contact with Angela Benson or anyone residing with her for the entire term of his sentence. Having reversed defendant's conviction for first-degree arson, and remanded for resentencing we need not, and do not, consider this issue.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.