

**IN THE COURT OF APPEALS OF IOWA**

No. 8-176 / 07-0544  
Filed March 26, 2008

**THOMAS WILLIAM KUNDE,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Clinton County, Charles H. Pelton,  
Judge.

Thomas Kunde appeals from the district court's order denying his  
application for postconviction relief. **AFFIRMED.**

Brian Farrell, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney  
General, Michael L. Wolf, County Attorney, and Elizabeth A. Srp, Assistant  
County Attorney, for appellee State.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

**ZIMMER, J.**

Thomas Kunde was convicted of first-degree arson following a jury trial held in July 2004. This court affirmed his conviction on appeal. Kunde subsequently filed an application for postconviction relief raising a variety of issues. Following a hearing, the district court denied his application. In this appeal, Kunde contends he received ineffective assistance of trial, direct appeal, and postconviction counsel in two respects. Upon review of the record, we affirm the district court.

***I. Background Facts and Proceedings.***

The record reveals the following facts: In the summer of 2003, Kunde, Raymond Cole, and some other men built a cabin for Maury Hill. The cabin was located in rural Clinton County.

Late in 2003, Kunde and Cole worked on a siding job together, which resulted in a falling-out between the two men. Cole testified that he kept more than half of the money given to him by the homeowner for the job because Kunde had not completed the work. Kunde testified that Cole owed him \$550 from the job, and that he kept Cole's tools, which were in his truck, thinking that Cole would pay him in order to get the tools back. Cole testified that he never contacted Kunde to get the tools back because Kunde was known to have a bad temper.

Shortly after this incident, Cole left for Florida. He remained in Florida until the spring of 2004, at which time he returned to Iowa. Following his return, Cole stayed at Hill's cabin and completed some work around the cabin. At this time, Kunde was living with his girlfriend, Katherine Beuse, and her daughter,

April, in LeClaire. Kunde was doing yard work at several places in the town of Folletts, including the B & S General Store. Kunde's route between LeClaire and Folletts on Highway 69 took him past Hill's cabin on a regular basis.

Cristina Lyons, an acquaintance of Cole and Kunde, testified that sometime around the beginning of April 2004, she had a conversation with Kunde at the B & S General Store's bar. Lyons told Kunde that she knew Cole was back in town but did not know where he was staying. Kunde told her that he had been looking for Cole because Cole owed him money.

Beuse testified that Kunde was very angry because Cole had "stiffed him" on the siding job. She stated that Kunde brought the subject up a lot, and had looked for Cole but could not find him. Beuse testified that on April 3, 2004, Kunde, Beuse, and April were driving past Hill's cabin on their way from LeClaire to Folletts when April said, "Mom, look, there is Ray." Kunde replied, "Well, I can't do anything about it now because the dork is with us."

Kunde testified that on the evening of April 3 he arrived at the B & S bar around 9:45 p.m. Cheryl Brotherton, who was bartending, testified that Kunde did not arrive at the bar until around 11:00 p.m. She testified that as she was closing out the cash register around midnight, Kunde bought a gallon can of Ozark Trail camping fuel and a quart of oil. She testified that she and Kunde left the bar together sometime between midnight and 12:30 a.m. Kunde, however, testified that he did not buy the camping fuel because it was too expensive. He stated that he left the bar by himself around 11:30 p.m. and arrived home around 11:50 p.m. He testified that his route home took him past the Hill cabin but he did not stop at the cabin and had no idea Cole or anyone else was staying there.

Cole testified that on the evening of April 3, he fell asleep inside the cabin around 7:00 p.m. He testified that during the night he was awakened by a noise, and then he saw the motion detector light on the deck come on. He heard a crackling sound and saw smoke coming through the door. He looked out the window and saw Kunde standing at the bottom of the steps that lead up to the deck of the cabin. He stated that the area where Kunde was standing was illuminated by the motion detector light and that he had no doubt the person standing there was Kunde. There was an explosion and Kunde ran for his truck, which Cole recognized because of the truck's distinctive visor. Kunde drove away on the gravel road heading toward the highway. Cole grabbed a rag to open the front door because it was hot, and once he was outside he saw Kunde heading south on the highway.

Cole saw flames going up the outside of the door. He also saw a gas can sitting in front of the door on the deck. He began to throw buckets of water on the fire, and eventually hooked up the hose to get the fire under control. Cole also kicked the gas can partway down the steps. Two men saw the fire from the highway. They stopped to help and called 911.

At 12:19 a.m., the first deputy was dispatched to the scene. Investigators found two matchbooks in front of the door to the cabin and a burned can of Ozark Trail camping fuel on the steps. The door of the cabin was blackened, and the wood around it was charred, as was the soffit above the door.

Beuse testified that a few days after the fire she heard rumors that Kunde had been involved. She confronted Kunde about the camping fuel, and Kunde

admitted that he had bought a can of fuel and it was in his truck. However, he was unable to produce the can for her.

On May 10, 2004, Kunde was charged with first-degree arson in violation of Iowa Code sections 712.1 and 712.2 (2003). The case proceeded to jury trial on July 26, 2004. The following day, the jury returned a verdict of guilty. Kunde was sentenced to a term of incarceration not to exceed twenty-five years. Kunde appealed his conviction, and on August 31, 2005, this court affirmed his conviction.

On November 28, 2005, Kunde filed an application for postconviction relief raising numerous claims. The hearing on Kunde's application for postconviction relief was heard on February 1 and February 19, 2007, the postconviction court issued its ruling denying the application for relief.

Kunde appeals.

## ***II. Scope and Standards of Review.***

Postconviction proceedings are generally reviewed for the correction of errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, because Kunde asserts violations of constitutional safeguards, including ineffective assistance of counsel, we make our own evaluation based on the totality of the circumstances. *Origer v. State*, 495 N.W.2d 132, 135 (Iowa Ct. App. 1992). This is the equivalent of de novo review. *Id.*

## ***III. Discussion.***

On appeal, Kunde contends he was denied effective assistance of counsel by the failure of his trial, direct appeal, and postconviction counsel to raise the following claims: (1) that Beuse's testimony concerning April's remark, "Mom,

look, there is Ray,” was inadmissible hearsay and (2) that the evidence was insufficient to prove he was the person who set the fire.

To establish ineffective assistance of counsel, Kunde must prove his counsel failed to perform an essential duty and prejudice resulted. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). To establish breach of duty, a defendant must overcome the presumption counsel was competent and prove counsel’s performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). A defendant may establish prejudice by showing a reasonable probability that, but for counsel’s errors, the result of the proceeding would have differed. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). We may dispose of Kunde’s ineffective assistance claims if he fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999). With these principles in mind, we now address each of Kunde’s appellate claims in turn.

#### **A. Beuse’s Testimony.**

Kunde first asserts his trial, direct appeal, and postconviction counsel failed to provide effective assistance because they failed to challenge Beuse’s testimony that her daughter, April, said, “Mom, look, there is Ray” as she, Kunde, and April drove past Maury Hill’s cabin during the day on April 3. The following testimony by Beuse was admitted without objection at Kunde’s trial:

Q. Did you see Ray Cole that day? A. I did not. My daughter did.

Q. What did she say? A. She said, Mom, look, there is Ray. She made a comment that, you know, he was really scruffy looking and looked like he needed a bath and ...

Q. And when she made that comment, were you in the area of the cabin? A. Yes.

- Q. And who was driving at that time? A. Tom [Kunde].  
Q. So all three of you were in the pickup? A. Correct.  
Q. Did you and Tom talk about this at all, or did he make any comment? A. I believe he made a comment, Well, I can't do anything about it now because the dork is with us, referring to my daughter.

Kunde contends his trial counsel should have objected to April's statement, as related by Beuse, as inadmissible hearsay, and that his later counsel should have claimed the failure to object constituted ineffective assistance. The State argues that counsel was not ineffective because Beuse's testimony was properly admitted as a statement of present sense impression under Iowa Rule of Evidence 5.803(1), and thus, there was no duty for counsel to object.

Iowa Rule of Evidence 5.803(1) provides:

The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) *Present sense impression*. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

"The underlying theory of this exception is that substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." *Fratzke v. Meyer*, 398 N.W.2d 200, 205 (Iowa Ct. App. 1986). Our supreme court first recognized the present sense impression in *State v. Flesher*, 286 N.W.2d 215 (Iowa 1979). In *Flesher*, the court explained that statements of present sense impression are considered to be reliable because there is "little or no time for calculated misstatement." 286 N.W.2d at 217 (internal quotation omitted). The court further explained that the phrase "immediately thereafter" should be interpreted to mean "a time within which,

under the conditions, it is unlikely that the declarant had an opportunity to form a purpose to misstate his observations.” *Id.* (internal quotation omitted).

In this case, April’s remark was made contemporaneously with her observation of Cole and in the presence of her mother and Kunde, who were in a position to confirm or deny what she said. April had neither an opportunity for calculated misstatement nor a motive to falsify. Therefore, an objection to the admissibility of April’s remark would have been meritless. Because trial counsel did not have a duty to raise a meritless claim, *State v. Nitchee*, 720 N.W.2d 547, 555 (Iowa 2006), we conclude Kunde was not denied effective assistance of counsel.

#### **B. Sufficiency of the Evidence.**

Kunde also asserts his prior counsel were ineffective in failing to challenge, or failing to preserve a challenge to, the sufficiency of the evidence proving that Kunde was the person who set the fire. Upon our review of the record, we conclude Kunde’s claim is without merit.

This court is bound by the jury’s verdict so long as the record contains substantial evidence of guilt. See *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). Evidence is substantial if it could “convince a rational jury of a defendant’s guilt beyond a reasonable doubt.” *State v. Smitherman*, 733 N.W.2d 341, 345 (Iowa 2007). When we determine the sufficiency of the evidence supporting a conviction, we consider all the evidence in the record, not just the evidence supporting the defendant’s guilt. *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005). However, when we make this determination, we consider the evidence in the

light most favorable to the State, and we include legitimate inferences and presumptions that may reasonably be deduced from the record. *Id.*

In this case, the evidence showed that Kunde was very angry because he thought Cole had “stiffed him” on a siding job that they had worked on together. Kunde told several people that he was “looking for” Cole because of the money Cole owed him. On the day of the fire, Kunde learned from Beuse’s daughter’s remark that Cole was around Hill’s cabin. Acknowledging Beuse’s daughter’s remark, Kunde stated, “Well, I can’t do anything about it now because the dork is with us.” Reasonable jurors could have interpreted Kunde’s statement as a threat that he planned to do something later when Beuse’s daughter was not around. An employee at the B & S store testified that less than an hour before the crime occurred, Kunde bought a gallon can of Ozark Trail camping fuel. Kunde testified that he was at the B & S store before he went home on the evening of April 3, and that his route from the store to his home took him past the cabin. At the time of the explosion, Cole testified that he saw Kunde. He also saw Kunde’s truck at the scene of the fire. After the explosion, Cole saw Kunde run toward his truck and then drive away. A burned can of Ozark Trail camping fuel was found at the fire scene. Beuse testified that Kunde told her he had bought a can of fuel, and claimed it was in his truck, but he could not produce it.

Based on the foregoing, we conclude the evidence in the record was sufficient to convince a rational factfinder that Kunde was the person who set the fire. Kunde points to inconsistencies in the witnesses’ testimony and asserts that the evidence does not support Kunde’s conviction. However, the jury was free to believe or disbelieve any of the testimony and to give weight to the evidence as

in its judgment such evidence should receive. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). Because we find there was substantial evidence that Kunde set the fire, we conclude Kunde was not denied effective assistance of counsel by his prior attorneys' failure to raise a meritless challenge to the sufficiency of the evidence. *Nitcher*, 720 N.W.2d at 555.

***IV. Conclusion.***

We find Kunde's claims of ineffective assistance of counsel are without merit and affirm the decision of the postconviction court.

**AFFIRMED.**