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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2013**

Timothy Wayne Kuhnau, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed October 28, 2008
Affirmed
Ross, Judge**

Morrison County District Court
File No. K6-03-1360

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Brian J. Middendorf, Morrison County Attorney, Todd E. Chantry, Assistant County Attorney, Jason M. Rolloff, Assistant County Attorney, Morrison County Attorney's Office, 213 Southeast First Avenue, Little Falls, MN 56345 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

ROSS, Judge

On appeal from a district court's order denying a petition for postconviction relief, Timothy Kuhnau argues that the trial court abused its discretion when it refused to include the defense of necessity in the jury instructions for the jury to apply the defense to charges of theft of a motor vehicle. Because Kuhnau's negligence precluded the availability of the necessity defense, we affirm.

FACTS

This case concerns Timothy Kuhnau's decision to take a tractor without permission from a farm where he left his pickup truck after it ran out of gas. Kuhnau was driving home on a Morrison County highway between 8:00 and 8:30 p.m. on a chilly October evening in 2003 with his girlfriend's three-year-old child. It was dark outside and the interior lights of his truck were not working, so Kuhnau could not read the gasoline gauge. When the truck ran out of gas, it coasted into the driveway of a farm.

Kuhnau saw lights in the farmhouse, and he walked to the door and knocked. Someone was home but no one answered. Kuhnau returned to his truck, and he gave the child his jacket because the child was getting cold. The outside temperature was 32 degrees or slightly colder. He checked a car parked nearby for keys but found none. He then found and entered a tractor and saw keys in the ignition, so he started it and sat inside with the child to get warm. But the tractor had no back window, so his effort was not especially effective. Kuhnau drove the tractor from the farm. He claimed at trial that

he did so to get help from a neighbor, not to steal the tractor. He drove across the highway and into a field, where the tractor became stuck.

Meanwhile, law enforcement officers had been dispatched to the farmhouse on a report of a suspicious vehicle—Kuhnau’s inoperable truck. The officers soon found the missing tractor, Kuhnau, and the child.

The state charged Kuhnau with theft of a vehicle worth over \$2,500 and child endangerment. At trial, Kuhnau sought a jury instruction on the necessity defense. The district court refused to give the instruction. The jury found Kuhnau guilty of theft of a motor vehicle and the state dismissed the child-endangerment charge.

Kuhnau filed a petition for postconviction relief seeking a new trial. The postconviction court determined that Kuhnau failed to meet his burden of production on the elements of the necessity defense, and it concluded that the trial court had not abused its discretion when it refused to instruct the jury on the defense. The court therefore denied Kuhnau’s request for a new trial. This appeal follows.

D E C I S I O N

Timothy Kuhnau argues that the postconviction court should have granted his request for a new trial because the trial court abused its discretion when it refused to instruct the jury on his necessity defense. We review the decision of a postconviction court for an abuse of discretion. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). The scope of this court’s review is limited to the question of whether sufficient evidence exists to sustain the findings of the postconviction court. *Id.* The refusal to give a requested jury instruction lies within the district court’s discretion, and the decision is

reviewed for an abuse of discretion. *State v. Cole*, 542 N.W.2d 43, 50 (Minn. 1996). The focus of the analysis is on whether the refusal resulted in error. *State v. Kuhnau*, 622 N.W.2d 552, 555 (Minn. 2001).

Kuhnau argues that his need to protect the child and himself from the cold weather required him to take the tractor, and that the jury therefore should have been told about the necessity defense. “A necessity defense defeats a criminal charge if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendant’s breach of the law.” *State v. Rein*, 477 N.W.2d 716, 717 (Minn. App. 1991) (quotation omitted), *review denied* (Minn. Jan. 30, 1992). The defendant must show that he had no legal alternative to breaking the law, the harm to be prevented was imminent, and a direct, causal connection exists between breaking the law and preventing the harm. *Id.* (citation omitted). The necessity defense applies only in emergency situations where the peril is instant, overwhelming, and leaves no alternative but the conduct in question. *State v. Johnson*, 289 Minn. 196, 199, 183 N.W.2d 541, 543 (1971). But the defense is unavailable if the emergency situation results from the defendant’s own recklessness or negligence. *Id.* That is Kuhnau’s insurmountable obstacle.

The trial court and postconviction court appropriately concluded that Kuhnau’s negligence rendered the necessity defense unavailable. Kuhnau testified that he was aware that his truck’s interior lights did not work, so he knew he would be unable to read his fuel gauge while driving. He does not contend that he had any reason to believe that the truck had an abundance of fuel for his drive. He chose to travel without assuring that

he had enough gasoline to complete his trip. The record does not indicate that the gauge was dysfunctional, only that Kuhnau could not see it in the dark. And whether or not the gauge was visible or functional, Kuhnau does not contend that he was unable to fill the truck with gasoline to ensure its safe operation. We therefore need not decide whether Kuhnau was in an emergency situation in which he faced “immediate and physical” danger, *Johnson*, 289 Minn. at 201, 183 N.W.2d at 544, because his own negligence in failing to maintain a sufficient supply of fuel to drive in rural Morrison County created the alleged danger prompting his quest for warmth.

Because Kuhnau’s negligence precluded the necessity defense, the trial court did not abuse its discretion when it refused to instruct the jury on its application. Because the trial court did not abuse its discretion, the postconviction court also did not abuse its discretion by denying Kuhnau’s request for a new trial.

Affirmed.