

FILED

JUN 30 1981

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed June 30, 1981

vs.

)

W. L. LEE,

)

1-99

63890

Defendant-Appellant.

)

Appeal from Black Hawk District Court - Peter Van Metre, Judge.

Defendant appeals his conviction of willful injury in violation of section 708.4, The Code 1979. AFFIRMED.

Paul T. Shinkle of Gottschalk, Shinkle & Long, Cedar Falls, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Roxann Ryan, Assistant Attorney General; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals his conviction of willful injury in violation of section 708.4, The Code 1979. He alleges that the trial court erred in admitting evidence of other crimes and in limiting the number of character witnesses he could call on his behalf. He also claims that he was denied effective assistance of counsel. We affirm.

I. Defendant's conviction resulted from his charge of willful injury when he allegedly held his girlfriend's daughter under scalding hot water after she soiled her pants. Over defendant's objection, the trial court allowed into evidence various photographs of the daughter's back showing scars which could have been caused by prior cigarette burns. Defendant claimed that that evidence was irrelevant and prejudicial since there was no showing that defendant inflicted those scars.

Assuming without deciding that the photographs should not have been admitted, we conclude that any resulting error was harmless. The following language is found in State v. Gilmore, 259 N.W.2d 846, 858 (Iowa 1977):

However, error requiring reversal may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. (citations omitted) . . . [T]he erroneous admission of evidence that may be justification for reversal is not prejudicial where substantially the same evidence is in the record without objection.

In this case, other photographs were introduced without objection which also showed the scars in question. In addition, testimony regarding the scars was taken without objection from defendant's girlfriend although she said that they were not caused by cigarette burns. Under these circumstances, the challenged photographs contained nothing which had not already been introduced without objection into the record in other forms. This issue presents no basis for reversal.

II. Defendant next argues that the trial court abused its discretion in limiting to six the number of character witnesses he could call on his behalf after defendant indicated that he wished to call twenty-nine such witnesses. We believe the authorities hold that such a limitation is a matter within the trial court's discretion if cumulative testimony will otherwise result. State v. Chambers, 179 Iowa 436, 451-52, 161 N.W. 470, 475-76 (1917); State v. Beabout, 100 Iowa 155, 160, 69 N.W. 429, 430 (1896). Here, the court determined that the testimony of more than six character witnesses for defendant would be merely cumulative and unnecessary. We cannot say the court abused its discretion in doing so.

III. Defendant also claims that he received ineffective assistance of counsel at trial because of various acts and omissions of his attorney relating mainly to his failure to object to the introduction of certain evidence. We do not think that the record presented on this direct appeal is sufficient to determine the effectiveness of defendant's trial counsel. That issue was not presented and argued by either side at trial. See State v. Kellogg, 263 N.W.2d 539, 544 (Iowa 1978). We therefore decline to determine this issue at this time. Defendant may, if he chooses, pursue this claim in postconviction proceedings under chapter 663A, The Code. Defendant presents no basis for reversal of his conviction. We therefore affirm.

AFFIRMED.