

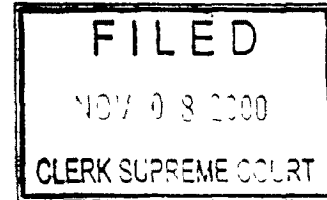
IN THE COURT OF APPEALS OF IOWA

No. 0-597 / 99-1405
Filed November 8, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICCO TERRELL COOPER,
Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, Jon Fister,
Judge.

Defendant appeals from his conviction for child endangerment in violation of Iowa Code sections 726.6(1) and (2) (1997). Defendant contends the district court erred by (1) improperly instructing the jury; (2) admitting evidence of his prior convictions; (3) holding a jury instruction conference in his absence and (4) denying his motion for judgment of acquittal and request for new trial.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Linda Myers, Assistant
County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Defendant-appellant, Ricco Terrell Cooper, appeals from his conviction for child endangerment in violation of Iowa Code sections 726.6(1) and (2) (1997). Defendant contends the district court erred by (1) improperly instructing the jury; (2) admitting evidence of his prior convictions; (3) holding a jury instruction conference in his absence and (4) denying his motion for judgment of acquittal and request for new trial. We affirm.

F.C., the eighteen-month-old victim in this case, is the son of Tamica Allison. On January 28, 1998, Ms. Allison left her son in the care of the defendant during which time the child was burned. The child soiled his diapers and defendant ran a bath in order to bathe him. Defendant testified at trial he then took F.C. into the bathroom and placed the child in the bathtub. F.C. suffered second-degree burns to his lower legs, buttocks and scrotum from the water in the bathtub.

Defendant further said after taking F.C. out of the bathtub, he noticed little bumps and skin peeling from F.C.'s legs and buttocks. He said he called Ms. Allison and asked about the peeling skin. Ms. Allison returned later in the evening and observed quarter size blisters on F.C.'s legs. She popped F.C.'s blisters and called "Ask-A-Nurse" for advice on how to treat F.C.'s injuries.

Three days later, on January 31, 1998, defendant and Ms. Allison took F.C. to the hospital in Waterloo after noticing F.C.'s legs were swollen and emitting yellow pus. F.C.'s condition required him to be immediately airlifted to the University of Iowa Hospital in Iowa City. F.C. spent eleven days hospitalized in Iowa City. Dr. Randall Alexander, an expert in child abuse and forensic

pediatric issues, examined F.C. and determined in his opinion F.C.'s injuries were consistent with and resulted from physical abuse.

Defendant was charged with child endangerment in violation of Iowa Code sections 726.6(1) and (2) (1997). The case was tried to a jury, which returned a verdict of guilty. Defendant was sentenced to a ten-year prison term. Defendant appeals contending the district court made several errors warranting reversal.

Defendant contends the district court improperly instructed the jury on the definition of serious injury. Defendant complains the instruction given improperly amplified the testimony given by one of the State's witness. The State advances the district court's jury instruction accurately expressed judicial interpretations of what constitutes serious injury.

Defendant contends the jury should have been given Iowa Uniform Criminal Jury Instruction No. 200.22 defining serious injury, which provides:

An element of the crime charged is that the victim suffered a "serious injury". A serious injury is a bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or extended loss or impairment of the function of any bodily part or organ.

The instruction given was a modification of the uniform instruction and provided:

An element of the crime charged is that the victim suffered a "serious injury". A serious injury is a bodily injury which creates a substantial risk of death, *if left untreated*, or which causes serious permanent disfigurement or extending loss or impairment of the function of any bodily part or organ. *Permanent scarring caused by a bodily injury can be one form of serious permanent disfigurement.*

Our review of alleged errors in jury instructions is for correction of errors at law. Iowa R. App. P. 4; *State v. Chang*, 587 N.W.2d 459, 460 (1998); *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998). This court's task is to determine whether the instructions that were given correctly state the law. *Chang*, 587

N.W.2d at 460; *State v. Mesch*, 574 N.W.2d 10, 12 (1997). The district court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. Iowa R. Crim. P. 18(5)(f); *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). The court may phrase the instructions in its own words as long as the instructions given fully and fairly advise the jury of the issues it is to decide and the law which is applicable. *Liggins*, 557 N.W.2d at 267. Error in giving or refusing jury instructions does not merit reversal unless it results in prejudice to the defendant. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Trial courts are not bound to give the uniform jury instructions. *State v. Harrington*, 284 N.W.2d 244, 250 (Iowa 1979).

A "serious injury" means a bodily injury which creates a substantial risk of death. See Iowa Code § 702.18. "[A] substantial risk of death means more than just any risk of death but does not mean that death was likely." *State v. Carter*, 602 N.W.2d 818, 821 (Iowa 1999) (quoting *State v. Anderson*, 308 N.W.2d 42, 47 (Iowa 1981)). If there is a real hazard or danger of death, a "serious injury" is established. *Id.*

The objectionable language does not lessen the State's burden of proof nor does it improperly amplify the testimony of any of the State's witnesses. Defendant has failed to show how he was prejudiced by this language in the instruction. The district court did not err by including in the instruction the phrase "if left untreated". The district court did not err in instructing "Permanent scarring caused by a bodily injury can be one form of serious permanent disfigurement". This language is in accord with Iowa case law. See *State v. Epps*, 313 N.W.2d 553, 557 (Iowa 1981) (holding ailments that manifestly come within the definition

of serious injury are injuries which leave the victim "permanently scarred or twisted . . . (in contrast to) a black eye, a bloody nose, and even a simple broken arm or leg)."

Defendant next contends the district court erred by allowing the State to cross-examine him regarding his prior convictions for possession of unauthorized weapons, violation of a drug tax stamp and possession with intent to deliver crack cocaine. The State contends the district court acted within its discretion in allowing the prosecution to impeach defendant with his prior conviction pursuant to Iowa Rule of Criminal Procedure 609(a)(1).

We generally review the trial court's rulings on admissibility of evidence for abuse of discretion. *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997). Reversal is warranted only upon a showing the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (citations omitted).

The defendant testified in his own defense. He did not testify on direct examination regarding any prior convictions. Defendant also did not make any claims he had never been convicted of a crime or that he was a law-abiding person. The State was permitted by the district court, over defendant's pre-trial objection, to inquire on cross-examination regarding defendant's prior convictions. The States' motivation to inquire about defendant's prior convictions was to impeach and discredit his direct testimony given on direct. The State was not attempting to introduce evidence of defendant's prior convictions as substantive evidence regarding proof of motive, opportunity, intent, preparation, plan, knowledge, identify or absence of mistake. See Iowa R. Evid. 404(b). The

following testimony was elicited by the State on cross-examination of the defendant:

Q. Mr. Cooper, you have a criminal history; is that right? A. Yes, ma'am.

Q. In 1993, you were convicted of carrying weapons and possession of unauthorized weapons; is that true? A. Yes, ma'am.

Q. In '94 you were convicted of possession with intent to deliver crack cocaine and a violation of a drug tax stamp, is that correct?

A. Yes, ma'am.

Ordinarily a party may contradict and discredit an adverse witness by presenting evidence showing the facts were other than as indicated by the testimony of the witness. *State v. Odem*, 322 N.W.2d 43, 45 (Iowa 1982). Prior convictions may in certain circumstances be used as impeachment evidence. *State v. Roth*, 403 N.W.2d 762, 767 (Iowa 1987); *see also State v. Goff*, 315 N.W.2d 768, 769 (Iowa 1982). Evidence is admissible if it is relevant to establishing or undermining the general credibility of the witness being impeached. *State v. Gilmore*, 259 N.W.2d 846, 853 (Iowa 1977).

Iowa Rule of Evidence 609 specifically addresses the offer of other crime evidence for the purpose of attacking a witness's overall credibility. Under rule 609, evidence of other crimes is admissible only if the crime involved dishonesty or false statement, not more than ten years have passed since the conviction and the probative value outweighs its prejudicial effect. *See* Iowa R. Evid. 609(a), (b). The proponent of the evidence bears the burden to show the probative value of the evidence outweighs its prejudicial effect. *State v. Hackney*, 397 N.W.2d 723, 727 (Iowa 1986).

Iowa trial courts have traditionally been granted discretion to admit evidence of prior felony convictions to impeach a criminal defendant, if the prior

conviction involved dishonesty or false statement and the trial court determines the danger of unfair prejudice does not substantially outweigh the conviction's probative value. See *State v. Zaehring*, 325 N.W.2d 754, 756-57 (Iowa 1982); *State v. Conner*, 241 N.W.2d 447, 454 (Iowa 1976); *State v. Miller*, 229 N.W.2d 762, 769 (Iowa 1975); *State v. Martin*, 217 N.W.2d 536, 542 (Iowa 1974). When balancing the danger of unfair prejudice against the conviction's probative value the trial court must take into account such factors as (a) nature of the conviction, (b) its bearing on veracity, (c) its age, and (d) its propensity to improperly influence the minds of the jurors. *Martin*, 217 N.W.2d at 542.

The purpose of admission of prior convictions is not to show the defendant is a bad person, but only to show facts bearing on the question whether the fact finder should believe the testimony. *Id.* at 540. Iowa courts have distinguished between acts of deceit, fraud, cheating, or stealing, which in common human experience reflect adversely on honesty and integrity, and acts of violence, which are less likely to do so. *Miller*, 229 N.W.2d at 769; *Martin*, 217 N.W.2d at 540-41. Crimes probative of honesty and integrity include perjury, and felonies involving theft. *State v. Jones*, 271 N.W.2d 761, 766 (Iowa 1978) (holding perjury probative of honesty); *Conner*, 241 N.W.2d at 455 (holding theft probative of honesty).

The trend is to restrict "dishonesty or false statement" to a crime "which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." 2 John W. Strong et al., *McCormick on Evidence* § 42, at 161 (5th ed.1999). Several additional crimes have now been

held on their face to meet his definition.¹ *Id.* However, federal courts and most state courts are unwilling to classify offenses such as possession of a weapon² and narcotic violations³ as per se crimes of “dishonesty or false statement.” *Id.*

Defendant’s prior convictions did not involve dishonesty or false statement. Prior cases applying the first prong of *Martin*, “dishonesty or false statement,” involved crimes that encompass deceit, fraud, cheating, or stealing in an elemental sense. *Zaehring*, 325 N.W.2d 756. Prior convictions for possession of unauthorized weapons, violation of a drug tax stamp and possession with intent to deliver crack cocaine are not admissible for impeachment purposes because they are not crimes involving dishonesty or false statements in their elemental composition.⁴

¹ See, e.g., *Altobello v. Borden Confectionary Products, Inc.*, 872 F.2d 215 (7th Cir.1989) (meter tampering); *United States v. Noble*, 754 F.2d 1324 (7th Cir.1985) (counterfeiting); *United States v. Lester*, 749 F.2d 1288 (9th Cir.1984) (false police report); *United States v. Harris*, 738 F.2d 1068 (9th Cir.1984) (passing counterfeit money); *United States v. Jackson*, 696 F.2d 578 (8th Cir.1982) (unlawfully transporting forged securities); *United States v. Gellman*, 677 F.2d 65 (11th Cir.1982) (failure to file tax returns); *United States v. Whitman*, 665 F.2d 313 (10th Cir.1981) (land fraud scheme); *United States v. Kiendra*, 663 F.2d 349 (1st Cir.1981) (possession of a stolen vehicle and receiving stolen goods); *Zukowski v. Dunton*, 650 F.2d 30 (4th Cir.1981) (willful failure to provide information for income tax purposes); *United States v. Williams*, 642 F.2d 136 (5th Cir.1981) (bribery); *United States v. Mucci*, 630 F.2d 737 (10th Cir.1980) (passing a bad check); *United States v. O’Conner*, 635 F.2d 814 (10th Cir.1980) (forgery).

² *United States v. Cameron*, 814 F.2d 403 (7th Cir.1987).

³ *United States v. Thompson*, 559 F.2d 552 (9th Cir.1977); *United States v. Hastings*, 577 F.2d 38 (8th Cir.1978); *State v. Hardy*, 946 P.2d 1175 (Wash.1997); *Contra People v. Walker*, 510 N.E.2d 29 (Ill. App.1987); *State v. Giddens*, 642 A.2d 870 (Md. App.1994) (drug distribution is relevant to a witness’s credibility; the practical demands of that occupation require drug dealers to be ready to engage in whatever conduct is necessary to avoid detection, and in turn that indicates a willingness to lie).

⁴ We limit our inquiry to the elemental composition of defendant’s prior convictions because no evidence exists in the record to determine whether the prior convictions rested upon facts establishing dishonesty or false statement. See *United States v. Payton*, 159 F.3d 49, 57 (2nd Cir.1998) (holding courts can look beyond the elements of the offense to determine whether the conviction rested upon facts establishing dishonesty or false statement.)

The district court improperly permitted the State to question defendant regarding his convictions which were not crimes involving dishonesty or false statements. The admission of defendant's convictions could have appealed to the jury's instinct to punish alleged drug dealers. See *Liggins*, 524 N.W.2d at 188-89; see also 1 J. Weinstein and M. Berger, *Weinstein's Evidence* § 403[03], at 403-43-44 (1994).

However, error in admission of evidence must be prejudicial to an accused to constitute cause for reversal. *Liggins*, 524 N.W.2d at 188. To establish prejudice, defendant must show a reasonable probability that but for the error the outcome of the trial would have been different. *State v. Crone*, 545 N.W.2d 267, 273 (Iowa 1996). The evidence against the defendant was overwhelming. Defendant testified he placed F.C. into the bathtub. Doctors who treated F.C. testified the location and extent of his injuries were indicative of physical abuse rather than accidental injury. Dr. Alexander, an expert on child abuse, testified that child abuse incident involving scalding injuries typical follow a toileting accident by the child. Dr. Kealey testified it would have been impossible not to notice the temperature of water was hot enough to cause the second-degree burns suffered by F.C. Furthermore, defendant admitted that he lied to investigators about leaving F.C. standing in the tub because he admitted he was "scared of going to jail". The overwhelming evidence of defendant's guilt so outweighs any prejudicial effect from the admitted evidence of defendant's prior convictions that we cannot say the outcome of the trial would have been different. The district court's admission of defendant's prior convictions in this case did not prejudice the outcome of his trial.

Defendant next contends the trial court erred in holding a conference on jury instructions in his absence. The State advances defendant failed to preserve error by adequately objecting to proceeding in defendant's absence. Defendant contends if error was not preserved his trial counsel was ineffective in failing to do so.

Defendant's contention regarding a violation of his right to be present during trial proceedings involves a constitutional claim, so our review is de novo. *State v. Smith*, 573 N.W.2d 14, 17 (Iowa 1997); *State v. Meyers*, 426 N.W.2d 614, 616 (Iowa 1988). Error necessitates reversal unless we conclude the error was harmless beyond a reasonable doubt. *Smith*, 573 N.W.2d at 17.

Defendant did not appear for a hearing on the jury instructions. The hearing date and time was announced in open court in the presence of the defendant. After a delay in the scheduled hearing defendant's attorney told the district court he had attempted to reach the defendant at both his home and on his cell phone. The attorney said he was unsuccessful but did leave messages for defendant further advising him of the scheduled hearing. The following discussion between the trial court judge and defendant's counsel Rodriguez took place:

THE COURT: Okay. And while I agree – or would agree if Mr. Rodriguez urged that the hearing on jury instructions was a critical time for the defendant to be present, he – the time of this hearing was announced in open court. I understand he was aware of it and may not have attached that much importance to it, and further, as long as there's no error in Mr. Rodriguez's objections to the instructions, it would be impossible for Mr. Cooper to show any prejudice from his absence as far as I can tell. But you'd agree, Mr. Rodriguez, that he has a right to be here and he should be here?

MR. RODRIQUEZ: I agree that he has a right to be here, and I expected him to be here.

THE COURT: Okay.

MR. RODRIGUEZ: And, Your Honor, my preference is always for him, my client, to be here, but I will proceed if the Court orders it.

THE COURT: Okay. Well I'm going to because he hasn't indicated that he intends to be here for final arguments or whatever, and we've had the jury waiting. Also, once we conclude our hearing we may need to make some changes in the instructions, and I'll allow a further delay to let him get here for final arguments if he intends to be here for that.

The hearing then proceeded absent the defendant. Present at the hearing were the trial judge, assistant county attorney and defense counsel. Near the end of the jury instruction hearing, another assistant county attorney told the court defendant was arrested on different charges the night before and was being processed at the Waterloo jail.

Iowa Rule of Criminal Procedure 25 implements a defendant's constitutional right to be present at trial. *State v. Randle*, 603 N.W.2d 91, 93 (Iowa 1999); *State v. Hendren*, 311 N.W.2d 61, 62 (Iowa 1981). Specifically, Rule 25 (2)(a) & (b) provides:

- 2. Continued Presence Not Required.** In all cases, the progress of the trial or any other proceeding shall not be prevented whenever a defendant, initially present, does on of the following:
 - a. Voluntarily absents himself or herself after the trial or other proceeding has commenced.
 - b. Engages in conduct which is such as to justify the defendant being excluded from the courtroom.

Iowa R.Crim. P. 25.

Like any personal constitutional guarantee, a defendant's right to be present at trial may be waived. *Randle*, 603 N.W.2d at 93. A defendant's voluntary absence from trial can be deemed a waiver of his right to be present. *Id.* For an absence to be deemed voluntary the defendant "must be aware of the processes taking place, of his right and of his obligation to be present, and he

must have no sound reason for remaining away.” *Hendren*, 311 N.W.2d at 62 (quoting *Cureton v. United States*, 396 F.2d 671, 676 (D.C. Cir.1968)).

Though defendant’s attorney indicated he expected that the defendant would appear for the hearing on jury instructions he made no objection to it proceeding in defendant’s absence. Even after learning his client was in jail defendant’s attorney made no request to have him brought to court to participate in the conference. Consequently, we agree with the State that error was not preserved on this issue. However, even if we were to find defendant’s attorney ineffective in failing to preserve error, defendant has failed to prove he was prejudiced. In defendant’s absence his attorney made the challenges to jury instructions he now is making on appeal. Defendant is not claiming had he been present additionally valid objections would have been urged. After defendant was brought to the courtroom and before closing arguments the court allowed defendant an opportunity to consult with his attorney on the jury instructions. After the consultation no objections were made to the instructions. There being no evidence that had defendant been at the conference it would have been helpful to his cause, we find no reason to reverse on this issue. See *Blackwell*, 238 N.W.2d 131, 137 (Iowa 1976).

Defendant next contends the district court erred in denying his motions for judgment of acquittal and for a new trial. Defendant claims the verdict was contrary to the weight of the evidence and there was insufficient evidence to prove specific intent or that he acted knowingly. The State contends the evidence was sufficient and the district court properly denied defendant’s motion for judgment of acquittal.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. We will uphold a finding of guilt if "substantial evidence" supports the verdict. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). "Substantial evidence" is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *Id.* We give consideration to all of the evidence, not just that which supports the verdict, including reasonable inferences which could be derived from all the evidence. *Id.*

We find sufficient evidence existed in the record to support the jury finding the defendant specifically intended or knowingly planned to harm F.C. Defendant's neighbor Sarah Pape testified on January 26, 1998 she awoke to the sound of a baby crying and a male voice yelling "shut up, shut up" repeatedly, followed by pounding. She testified the same thing happened again on January 27, 1998. Based on what she heard, she called the nonemergency number of the police as well as the Department of Human Services to report the incident.

Dr. Alexander and Dr. Kealey both testified they believed the location and distribution of F.C.'s burns were indicative of physical abuse rather than accidental injury. Both doctors felt the delay in seeking medical attention supported the fact the burns were intentionally inflicted. Dr. Alexander testified that child abuse incidents involving scalding injuries typically follow a toileting accident by the child and water as hot as what was necessary to burn F.C. would be recognized by any adult regardless of his experience in caring for children.

The evidence presented on behalf of the State was sufficient to support a finding beyond a reasonable doubt that defendant's intended to commit child endangerment. The district court properly denied defendant's motion for judgment of acquittal.

The conviction and sentence entered against the defendant for violating Iowa Code sections 726.6(1) and (2) (1997) is affirmed.

AFFIRMED.