

IN THE COURT OF APPEALS OF IOWA

No. 2-746 / 12-0020
Filed October 3, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIAN LEON BOGGS,
Defendant-Appellant.

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

Brian Boggs appeals the district court's denial of his motion for a new trial,
contending there was prosecutorial misconduct that denied him a fair trial.

AFFIRMED.

Mark C. Smith, State Appellate Defender, Shellie L. Knipfer, Assistant
Appellate Defender, and Tyler J. Buller, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney
General, and Paul M. Goldsmith, Special Prosecutor, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

DOYLE, J.

Brian Boggs appeals the district court's denial of his motion for a new trial. He contends there was prosecutorial misconduct, created by an "appearance of impropriety" by the initial county attorney who had previously represented Boggs's ex-wife, thus denying him a fair trial. We affirm.

I. Background Facts and Proceedings.

On September 13, 2010, Brian Boggs was charged by trial information with willful injury in violation of Iowa Code section 708.4(1) (2009) stemming from an incident in Wayne County on August 21, 2010. The trial information alleged Boggs made "intentional physical contact with [Rodney Lemke] which was not justified and was intended to cause serious injury by striking Lemke in the left side of the head with a metal baseball bat, resulting in serious injury." The minutes of evidence attached to the trial information stated, among other things, that the Wayne County Deputy Sheriff Tyler Moore would testify that on the evening of August 21, he spoke with Boggs at Boggs's residence about Lemke's injury:

[Boggs] indicated he had received a call from his brother . . . indicating that [Boggs's] ex-wife and her boyfriend [Lemke] were in town at the bar and that [Boggs] then sent a text message to his ex-wife asking her why she couldn't pay child support but could drive [fifty] miles and drink beer.

. . . [Boggs] stated he received a text message back from a number he didn't recognize indicating that the person's taxes were paying for [Boggs's] food stamps . . . so it didn't matter what [Boggs's] ex-wife was doing and that the person loved [Boggs's] ex-wife.

. . . [Boggs] stated he sent a text back to the person indicating to "Come say that to my face—you know where I live" and that [Boggs] admitted that his text message to the person was in an aggressive tone.

. . . [Boggs] stated a short time later there was a knock on the front door of his residence and his ex-wife's brother . . . and another male unknown to [Boggs] were standing at the door and that after a short verbal exchange, [his ex-wife's brother] broke the window of the door out and that [Boggs] grabbed an aluminum baseball bat, went outside and struck the unknown male in the head with the bat, knocking the man down to the ground.

. . . [W]hen asked if the subject struck with the bat had done anything threatening in nature to [Boggs], [Boggs] acknowledged that the male had not done anything threatening and that [Boggs] repeated several times that the subject that [Boggs] had struck with the bat "didn't move an inch" in response to the question.

The minutes further stated that a nurse practitioner would testify that on the evening of August 21, Lemke was brought to the emergency room "suffering from a severe head injury with substantial swelling and that a CT scan performed on Lemke which revealed multiple skull fractures and a subdural hematoma consistent with being struck by a baseball bat." The trial information was signed by the special prosecuting attorney for Lucas County, Paul Goldsmith, with his approval of the trial information, stating: "This Information and the Minutes of Evidence accompanying it have been examined by me and found to contain sufficient evidence, if unexplained, to warrant a conviction by a trial jury."

The matter proceeded to trial, and Deputy Moore testified substantially as stated in the minutes of evidence attached to the trial information. Deputy Moore also testified that he had spoken to Alan Wilson, the Wayne County Attorney, prior to filing the criminal complaint against Boggs. The deputy explained he reported the incident to Wilson, and Wilson advised him he should file a willful injury charge against Boggs. Boggs made no objections or challenges concerning this evidence.

Boggs asserted various defenses. He testified at trial that his children were just a few feet away from him at the time of the incident. He testified the window of his door was broken first, and Lemke took steps towards him. He testified he struck Lemke with the bat, acting to protect his children, his home, and himself.

The case was submitted to the jury. The jury was instructed as to the elements of willful injury and the lesser-included offenses. The jury was further instructed as to Boggs's defenses, including that if the jury determined Boggs acts were justified, Boggs was not guilty. The forms of verdict included the lesser-included offenses. The jury found Boggs guilty of willful injury as charged.

Thereafter, Boggs filed several posttrial motions, including seeking a new trial for alleged prosecutorial misconduct. Boggs argued Wilson, the Wayne County Attorney, had a conflict of interest because Wilson represented Boggs's ex-wife in the dissolution of the Boggses' marriage earlier that year in 2010. He asserted because Wilson told the deputy what charge to file against Boggs, drafted the minutes of evidence attached to the trial information, and talked to the prosecuting attorney Goldsmith about the incident, both county attorneys' participation in the case was improper prosecutorial misconduct prejudicing him from receiving a fair trial.

At the hearing on the posttrial motions, Wilson explained his employment as the Wayne County Attorney was a part-time position as set forth in the Iowa Code to save rural counties money, and he had no assistant attorneys in his county. He testified that he and Goldsmith regularly exchanged cases where there was an appearance of a conflict of interest for either county attorney. He

testified he generally recused himself from prosecuting someone who had been a client of his in private practice, and his staff generally prepared trial informations when needed. He stated he sometimes took part in preparing the minutes of evidence attached to the trial information, which then went to Goldsmith for Goldsmith to approve or do whatever he felt was appropriate.

Wilson testified that, in this case, the deputy explained the scenario of the incident and potential charges that could be filed. Wilson stated the deputy later told him who the parties were, and Wilson told the deputy he would have to recuse himself. He testified he could not remember whether it was he or his staff who prepared the minutes of evidence in the case, but he stated he did not consult with Goldsmith about the case. He testified whether to prosecute or name other witnesses was Goldsmith's decision. Goldsmith testified he did not consult with Wilson about the case, and it was his decision to charge Boggs with willful injury.

The district court denied Boggs's motion for new trial. Boggs appeals.

II. Prosecutorial Misconduct.

Boggs contends Wilson's involvement in the early stages of the case created an "appearance of impropriety," thus denying him a fair trial. The State counters that error was not preserved. We will bypass the State's error preservation concerns and proceed to the merits. *State State v. Taylor*, 596 N.W.2d 55, 56 (Iowa 1999). We review the district court's decision on a motion for a new trial for an abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003).

A meritorious prosecutorial misconduct claim requires proof of two elements: (1) misconduct and (2) “the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial.” *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). However, “it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial.” *Id.*; *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003). Several factors are considered when determining whether prejudice resulted from the misconduct, including: (1) the severity and pervasiveness of the misconduct, (2) the significance of the misconduct to the central issues in the case, (3) the strength of the State’s evidence, (4) the use of cautionary instructions or other curative measures, and (5) the extent to which the defense invited the misconduct. *Graves*, 668 N.W.2d at 869. We note it is generally “axiomatic a prosecutor should never try a defendant with whom he is embroiled in civil litigation.” *Blanton v. Barrick*, 258 N.W.2d 306, 311 (Iowa 1977).

Upon our review of the record, we agree with the district court that Boggs failed to prove any misconduct by Wilson in this case. Here, there was no dispute that Boggs hit Lemke in the head very hard with a baseball bat and that Lemke had serious injuries as a result. There is no evidence that Wilson’s recommendation of the willful injury charge was anything but premised on the actual facts of the case. Goldsmith independently reviewed and approved the trial information and minutes of evidence, as did a judge. Goldsmith was the prosecutor on the case, not Wilson. We agree with the district court that Boggs

failed to produce any objective facts demonstrating [Wilson] relied upon or used any knowledge he would have obtained regarding [Boggs] from his representation of [Boggs’s ex-wife] prior to the

incident giving rise to the charges herein when he advised [Deputy Moore] regarding the charges to file against [Boggs] and in preparing the proposed minutes of testimony that were attached to the trial information which he submitted for the consideration of [Goldsmith].

Boggs asserts there was an “appearance of impropriety,” but, as noted above, it is the prejudice resulting from misconduct that warrants a new trial for a defendant. See *Graves*, 668 N.W.2d at 869. We note the Boggs’s dissolution had been finalized many months before the incident, and the dissolution of their marriage did not pertain to the charges in the later incident. Additionally, the possible lesser-included offenses, with which Boggs argues he should have been charged, were in fact submitted to the jury for their consideration, as well as his asserted defenses, and rejected. Boggs failed to demonstrate he was prejudiced by Wilson’s early and limited involvement in the case. Accordingly, we conclude the district court did not abuse its broad discretion in denying Boggs’s motion for a new trial.

AFFIRMED.