IN THE COURT OF APPEALS OF IOWA

No. 3-969 / 12-2240
Filed January 9, 2014

CHRISTOPHER JAY MARTIN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Douglas F. Staskal, Judge.

Jay Martin appeals from the dismissal of his application for postconviction relief. **AFFIRMED.**

Alfredo Parrish and Luke DeSmet of Parrish, Kruidenier, Dunn, Boles, Gribble, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, John P. Sarcone, County Attorney, and Jeffrey Noble and Frank Severino, Assistant County Attorneys, for appellee State.

Heard by Danilson, C.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.

Jay Martin appeals from the dismissal of his application for postconviction relief. He argues he was provided with ineffective assistance of counsel in several ways: by trial counsel in failing to object to a prosecutor's statements, in failing to make a motion for judgment of acquittal on the issue of malice aforethought, and by allowing testimony regarding prior murders in his home; and by appellate counsel in failing to raise the issue of prosecutorial misconduct on appeal and by conceding he was not in custody during one phase of an interrogation. He also argues the cumulative effect of these errors was the denial of his right to a fair trial. We affirm, finding Martin's trial counsel had no duty to object to the prosecutor's closing argument, Martin's counsel had no duty to move for acquittal as sufficient evidence existed to support the jury's finding of malice aforethought, no prejudice resulted from the evidence of prior murders in his home, Martin was not prejudiced by his appellate counsel's concession regarding custody, and there was no cumulative error denying Martin of his right to a fair trial.

I. Facts and proceedings.

This is the second time we have heard Martin's case on appeal. *See State v. Martin*, No. 02–1509, 2004 WL 1836122 (Iowa Ct. App. Aug. 11, 2004). We adopt the facts as stated in the direct appeal from his conviction for first-degree murder.

> From the testimony adduced at trial, the jury could have found the following facts. After what Martin described as a normal family evening, his wife, Karla, and two children, four-year-old Daly and three-year-old York prepared for bed. Karla slept with Daly in one bedroom and Martin slept with York in the master bedroom.

> However, before going to bed that night Martin claims he went downstairs and consumed Advil Cold and Sinus pills and Sonata, a sleeping agent, with peppermint schnapps. This was in addition to the prescription medication Martin had taken earlier in the day, consisting of Wellbutrin (for depression), Xanax (for anxiety), and Valium (for grinding his teeth). Martin testified that after taking the Advil and Sonata he began feeling hot and nearly fell over. He remembers starting to climb the stairs but does not recall how he got upstairs and into bed. The next thing Martin claims to remember is waking up in the master bedroom with York and needing to use the restroom. He got out of bed carefully so as not to wake York, then realized York was cold. Martin sat for some time, contemplating what to do, before yelling out to Karla. Karla got out of bed and found York lying lifeless on the bed. Martin called 911. Emergency personnel arrived and took York to the hospital, where he was pronounced dead. His body appeared to have suffered several blows and he had been strangled. Martin went to the hospital while Karla stayed at the home with Daly. While police were securing the home and beginning the investigation of the premises, Karla and Daly were taken to the West Des Moines Police Station. From the hospital, Martin was also taken to the police station. Prior to and during police interviews that morning, Martin made several inculpatory statements to police and to his priest. Martin was later arrested for the death of York.

Martin, 2004 WL 1836122, at *1. On February 19, 2002, Martin was charged by trial information with first-degree murder.[1] On June 10, 2002, he filed a motion to suppress statements he made at the police station. A hearing was held on the motion June 20–21, 2002. This motion was denied.

The district court divided its ruling on the motion to suppress into five separate phases of the questioning of Martin during which Martin was not provided with his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The district court defined the first interaction as Martin's preliminary conversations

[1] The prosecution charged murder under Iowa Code section 707.2 (2001), which includes three relevant alternatives: premeditated murder, felony murder (here, with the predicate felony being child endangerment), and child endangerment causing death. These three specific alternatives were presented to the jury by the court in the statement of the case and jury instructions.

with police after being transported to the police station from the hospital. At this point, Martin was placed in an unlocked conference room adjacent to the lobby. The court found Martin was not in custody and that the inquiry by police during that phase was not an interrogation. The second interaction took place in the same room and involved Martin's request to contact, and the police's efforts to obtain, a lawyer for him. The district court also found that Martin was not in custody at this point. The third interaction involved Martin's statements to a priest in the presence of an officer. The court concluded Martin was still not in custody at this point. The fourth interaction involved statements made by Martin after the police had decided to arrest him. The court noted questioning in the conference room changed and became interrogation by two detectives. The court concluded Martin was not in custody at this point, though the decision was a very close one. The court commended the State on its discretion in refraining from offering into evidence at trial Martin's statements from this fourth interaction. Finally, the court analyzed Martin's statements at booking. The court found his statements at this point were not the result of interrogation.

Trial was held August 19–28, 2002. Martin pursued a defense of intoxication, claiming a combination of medications and alcohol prevented him from forming specific intent.[2] Many witnesses testified, including the officers, priests, Martin, Martin's wife, Martin's neighbor, Martin's friend, two doctors, and several investigators. Closing arguments were made August 28, 2002. The State emphasized the discrepancies between Martin's testimony at trial and what he previously said about his lifestyle and what happened the night of York's

[2] Martin's intoxication defense was directed to the count charging premeditated murder.

death. In arguing this point, the State used variations on the word "lie" several times. The State also analogized Martin to a monster, stating that while most children are afraid of a monster under their bed, in York's case, the monster was lying next to him. The State also made statements about what York would never experience after dying at such a young age. Finally, the State urged the jury to give York justice by finding Martin guilty of first-degree murder. After this statement, Martin's counsel objected and the objection was sustained.

Martin was found guilty of first-degree murder in a general verdict and sentenced to life imprisonment. He filed an appeal, alleging insufficient evidence supported a finding of malice aforethought, the district court improperly denied the motion to suppress Martin's inculpatory statements (Martin's appellate counsel conceded Martin was not in custody before the third interaction), and the court improperly denied a mistrial based on the testimony of the State's doctor. We affirmed, finding the argument regarding malice aforethought was not preserved, Martin was not interrogated during the third interaction (not addressing the second interaction which was the subject of counsel's concession), and a mistrial was unnecessary as the doctor's statement was stricken from the record.

Martin filed an application for postconviction relief on February 14, 2006. Hearing took place July 30, 2012, and the district court denied his application on December 3, 2012.[3] Martin appeals.

[3] During the hearing, Martin's trial counsel stated that as a matter of strategy, he might not object to something during a trial because an objection might draw more attention to the situation. He also stated that during emotional trials, some of his strategy would be to "redirect the jury away from emotion and towards what the law is[.]"

II. Analysis.

We review ineffective-assistance-of-counsel claims de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). "Two elements must be established to show the ineffectiveness of defense counsel: (1) trial counsel failed to perform an essential duty; and (2) this omission resulted in prejudice. A defendant's inability to prove either element is fatal." *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003) (internal citations omitted).

A. Prosecutorial misconduct.

1. *Trial counsel's failure to object to closing argument.*

At the postconviction hearing, trial counsel testified he made a tactical decision not to object to the emotional appeals during the closing argument of the prosecutor. While an attorney's decision on strategy usually precludes a finding of ineffective assistance, we examine the context for reasonableness. *State v. Ondayog*, 722 N.W.2d 778, 786–87 (Iowa 2006).

> The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct. Evidence of the prosecutor's bad faith is not necessary, as a trial can be unfair to the defendant even when the prosecutor has acted in good faith. The second required element is proof the misconduct resulted in prejudice to such an extent that the defendant was denied a fair trial. Thus, it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial. In determining prejudice the court looks at several factors within the context of the entire trial. We consider (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. (internal citations omitted). "We start with the principle that, in closing arguments, counsel is allowed some latitude. Counsel

may draw conclusions and argue permissible inferences which reasonably flow from the evidence presented. However, counsel has no right to create evidence or to misstate the facts." *State v. Carey*, 709 N.W.2d 547, 554 (Iowa 2006) (internal citations and quotation marks omitted).

Martin's claim of prosecutorial misconduct rests on comments made by the prosecutor during his closing argument. He points to three separate ways in which, he reasons, the argument was improper. The first is the prosecutor's reference to Martin as a liar, the second is the allusion to Martin as a monster, and the third includes other emotional appeals to the jury. Martin relies on our supreme court's ruling in *Graves* to argue these statements constituted misconduct so pervasive that they denied him due process of law.

a. Retroactivity of Graves. The State and Martin disagree as to whether the *Graves* decision should apply to this case. The State argues *Graves* introduced a new legal standard, and therefore the holding is not retroactive to Martin's trial which predated Graves. Martin disagrees. In part of the *Graves* opinion relevant to the issue presented here, counsel was found to have breached an essential duty by failing to object to remarks by a prosecutor during closing argument. *Id.* at 876. In reaching this ruling, the court detailed several Iowa cases along with cases from other states, concluding "Iowa follows the rule that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." *Id.* Our supreme court has also applied *Graves* in a postconviction proceeding for a case dating prior to the *Graves* decision. *See Nguyen v. State*, 707 N.W.2d 317, 323–24

(Iowa 2005). We therefore will apply the *Graves* analysis here, acknowledging its unavailability to counsel at the time of trial.

b. Prosecutor's statements Martin was lying. We turn to the comments characterizing Martin as untruthful, employing the Graves analysis as to whether a prosecutor's statement that a defendant lied was misconduct:

> Based on these principles, the following questions must be answered to determine whether the prosecutor's remarks made in the case before us were proper: (1) Could one legitimately infer from the evidence that the defendant lied? (2) Were the prosecutor's statements that the defendant lied conveyed to the jury as the prosecutor's personal opinion of the defendant's credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful? and (3) Was the argument made in a professional manner, or did it unfairly disparage the defendant and tend to cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence?

Graves, 668 N.W.2d at 874–75.

Martin points to a section of the prosecutor's closing argument where the prosecutor questioned Martin's credibility:

> In order to believe that the intoxication is a defense in this case and is a viable defense, you have to believe a couple of things. This first thing that you must believe is that he ingested the substances, and the second thing that you need to believe is that he ingested the substances, and the second thing that you need to believe is that it made a difference . . . . The only source that can provide that information to you is the Defendant. There is nobody else that can tell you what substances, if any, that he took.
>
> He is a self-proclaimed liar. He lied to his wife. He lied to his best friend. He lied to his priest. He lied to his next-door neighbor. He lied to the original officers that arrived at the scene. He arrived—he lied to the chaplain—or the minister at the hospital. He lied to the emergency room nurse. He lied to the emergency room doctor. He lied to the police. He lied to the deputy at the jail that booked him into the jail. He lied to all those people, yet he

> wants you to believe he's telling you the truth. Well, I submit to you, ladies and gentlemen, he lied to you too.

The State also used variations on the word "liar" in its rebuttal argument:

> I would like to start out by talking about some of the fallacies of logic we heard from [Martin's counsel]. The first fallacy of logic is because somehow we've cross-examined this Defendant and suggested that what he said to Father Cade is different than what he said in the room that we were assuming one of his two statements is true. That's a fallacy of logic. That's not true. Both the Defendant's statements were a lie and that, in fact, is our theory of the case.
>
> Now, we've got those questions as to his credibility . . . . Let's talk about the words of a man then, January 9th, versus the words of a man now in this courtroom. . . . [S]tory number one that morning is that "I was on my way back from the bathroom and I kicked something and I thought it was laundry, and I later figured out it was York." He tells us today an entirely different story. . . . If it's a lie, what does that tell us about his mental state during a time that he tells us he can't remember. He was able to create a lie, remember it, and relay it with some inconsistencies, but relay it over and over and over again.

Our first inquiry is, "Could one legitimately infer from the evidence that the defendant lied?" *Id.* at 874. In his brief, Martin admits that "one could infer from the evidence that [Martin] had lied, but not about all of the matters alleged by prosecutors" including lying to the "hospital chaplain, his next-door neighbor, the emergency room doctor, the police, or the deputy during booking." The hospital chaplain testified Martin told him two different stories during their conversation about how he found York. The next-door neighbor also testified Martin had been up all night one night doing strategic planning, while Martin later acknowledged he was at a bar. Regarding the emergency room doctor, the police, and the deputy during booking, the State points to, and the record reflects, Martin's conflicting statements regarding the prescription drugs he took the night of York's death. Inconsistencies in Martin's statements as presented to the jury between

his admissions before trial and his trial testimony set the stage for legitimate inferences and argument that Martin lied.

The State argues the prosecutor's final comment "Well, I submit to you, ladies and gentlemen, he lied to you too" is also a reasonable inference from the evidence and—despite the use of the pronoun "I"—was not offered as a personal opinion of the prosecutor. The State points to the differences between Martin's testimony and Martin's previous statements about his drinking and prescription medication consumption. The State also points to Martin's evasive responses during cross-examination. We find a legitimate inference could be made that Martin lied in court. The prosecutor's phrase "I submit" is a form of argument, and permissible in this context. Likewise, the comments in rebuttal rest on these inferences and therefore are legitimate inferences from the evidence. *See id.* at 875.

Next, we consider, "Were the prosecutor's statements that the defendant lied conveyed to the jury as the prosecutor's personal opinion of the defendant's credibility, or was such argument related to specific evidence that tended to show the defendant had been untruthful?" *Id.* at 874 As we articulated above, these comments were rooted in the evidence presented by the State of Martin's inconsistent statements.

Finally, we ask, "Was the argument made in a professional manner, or did it unfairly disparage the defendant and tend to cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence?" *Id.* at 874–75. We find the prosecutor did violate this prong of the *Graves* test. The "attorney here did not, however, limit his argument to a discussion of whose

testimony was most believable based on reasonable inferences from the evidence; rather, he improperly resorted to inflammatory characterizations of the defendant's testimony." *Id.* at 876. The repeated use of the word liar by the prosecutor—thirteen times in as many short sentences—constituted an incendiary rhetoric playing to an emotional response of the jury. *See State v. Carey*, 709 N.W.2d 547, 558 (Iowa 2006) ("It is not so much the fact that the prosecutor suggests the defendant is untruthful that creates the misconduct. Instead, it is the use of the word liar itself, as this court found it to be inflammatory and improper." (internal citations and quotation marks omitted)).

However, our inquiry does not end at a finding of misconduct; we must next determine if counsel's failure to object to the misconduct deprived Martin of a fair trial. *Id.* ("While this court has held that referring to a defendant as a liar is misconduct, such comments do not always result in prejudice.") Before we do so, we consider the remaining points of potential misconduct argued by Martin.

c. Prosecutor's allusion to Martin as a monster. Martin next argues the following statements constituted prosecutorial misconduct and that his counsel was ineffective in failing to object:

> Well, what can happen in the dark is when you're in your bed and you're all alone there can be monsters underneath that bed. There could be monsters in that closet . . . . It's because when Mom and Dad are there with you, that monster from under the bed can't reach up and grab you. It's because when Mom or Dad are laying next to you on that bed, you don't have to worry about that monster coming out of the closet and getting you.
>
> What York Martin didn't know, what York Martin couldn't know is that that monster wasn't underneath his bed. It wasn't in the closet. That monster was laying right next to him and looked exactly like his dad. That monster was twice his height, it was almost five times his weight, and he turned that beautiful little boy into that.

On rebuttal, the State again referenced the "monster" analogy, attacking Martin's claim of intoxication:

> Defendant asks us to believe that he created a monster. He asks us to believe that he created a monster he couldn't control, a monster born of prescription drugs. If we believe what he told police on the morning of January 9th, this was a monster created with Wellbutrin, Valium, and Xanax, three drugs that warn against using them with alcohol and then this Defendant added alcohol. The problem is, that must be what created a monster, and we know that this Defendant has been mixing up this cocktail and slamming it down and lying about it for months, if not years.

Martin references our decision in *State v. Blanks*, 479 N.W.2d 601, 603–05 (Iowa Ct. App. 1991), to support the proposition that counsel's allusion to Martin as a monster constituted misconduct. We disagree. In *Blanks*, we repeatedly noted the reprehensible nature of the prosecutor's comments stemmed from their racial nature. 479 N.W.2d at 605. Under other circumstances, we expressly held that a prosecutor is allowed use embellishments of oratory and express ideas in the prosecutor's own way. *Id.* at 604. While a prosecutor must be careful not to exploit the passions of the jury, in an already emotional case involving the death of a child, we find the use of the "monster" metaphor was close to the line but within the permissible range of conduct for the prosecutor.

d. Other emotional appeals. Next Martin argues the following comments by the prosecutor were emotional appeals constituting misconduct:

> Anybody that can look at those pictures [of York Martin] when you go into the jury room and say that was correct discipline, that wasn't too much, needs to reconsider their position.
>
> . . . .

> York Martin will never lose a first tooth. York Martin will never go to his first day of school. York Martin will never hold his own child in his arms and tell his own child, yes, all the people that love you, do you want to hear about all the people that love you? That's never going to happen. . . . Ladies and gentlemen, by your verdict finding the Defendant guilty of First Degree Murder, you will be telling him, York, you will get your justice.

After the final comment, defense counsel objected and the objection was sustained.

Again, we consider whether the prosecutor's argument was made in a professional manner, or whether it unfairly disparaged the defendant and tended to "cause the jury to decide the case based on emotion rather than upon a dispassionate review of the evidence." *Graves*, 668 N.W.2d at 874–75. Martin cites to our supreme court's decision in *State v. Wertz*, 677 N.W.2d 734, 739 (Iowa 2004), where during closing arguments the prosecutor held a baby book up before the jury and described several childhood activities the victim would never experience, tearing a page out of the book for each activity. The closing argument was found to be an improper attempt to appeal to the passions of the jury, and therefore (in addition to improper questioning) the court found prosecutorial misconduct. *Wertz*, 677 N.W.2d 739.[4] However, in the court's decision in *Carey*, 709 N.W.2d at 555, the prosecutor's "sarcastic and snide" comments, were "based on a legitimate assessment of the evidence and . . . did not constitute misconduct, given the considerable latitude accorded to lawyers in final arguments." We need not dwell on whether these emotional appeals constituted misconduct, however, as we find our prejudice prong determinative.

[4] Like *Graves*, *Wertz* was decided after the trial in this case and its holding was not available to defense counsel or the prosecutor. *See State v. Wertz*, 677 N.W.2d 734 (Iowa 2004).

e. Prejudice. We conclude that even if we found misconduct in the disparaging nature of the "liar" statements, in the "monster" metaphor and in all three of the "York will never experience" statements, Martin cannot show prejudice to the extent he was denied due process of law when considered in the context of the trial and the limitations of his defense of intoxication. *See Graves*, 668 N.W.2d at 874–75. In reaching this conclusion, we consider "(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." *Id.* (internal citations omitted).

Regarding the severity and the pervasiveness of the conduct, we note Martin's complaints solely arise in the context of closing argument. *See id.* (noting that remarks about defendant's lying alone may not have resulted in sufficient prejudice to warrant new trial). Considering the length of the prosecutor's closing argument, the comments were not overly protracted and were based on the evidence.

Martin notes that the comments regarding whether he lied pertained to central issues in his case—whether he had specific intent or malice aforethought to kill his son. He argues that because he was the only one who knew what substances he consumed that night, the veracity of his testimony pertained to the most central part of his argument. We agree. However, he was not thereby entitled to immunity from his inconsistent statements, particularly when his trial testimony contained enhanced claims of his intoxication. Regarding the

remaining points of potential misconduct, we find they do not pertain to Martin's defense, but rather to the undeniable fact of the death of a child.

Next, we look to the strength of the State's evidence. *Id.* The State showed the only person who was with York that night was Martin, introduced several incriminating statements by Martin, and showed the violence required to kill the child. It also demonstrated Martin's conflicting statements about what he consumed that night. The State's evidence against Martin was strong, a factor that makes the prosecutor's over-reaching arguments difficult to condone, but which also governs our evaluation of Martin's proof whether any misconduct actually rose to the level of denying Martin a fair trial. *See id.*

As to the use of cautionary instructions or curative measures, Martin's counsel objected to the prosecutor's statement calling for justice; this objection was sustained, and the jury was instructed to disregard the statement. The jury was likewise instructed, though not directly in response to the prosecutor's comments, to decide the case on the facts, not emotions. During the defense's closing argument, Martin's counsel called attention to the emotional nature of the prosecutor's statements, arguing this showed weakness in the State's case and admonishing the jury not to use their emotions to decide the case.

Finally, we consider the extent to which Martin invited the conduct. *Id.* Martin took the stand, making statements that conflicted with those he made previously on the day of his arrest. He put his credibility in issue. His counsel also admitted in the postconviction trial that Martin's testimony regarding family time spent the evening before the murder was part of a deliberate emotional appeal and consistent with counsel's strategy. These tactical decisions at trial

invited the prosecutor's arguments about inconsistent statements. Martin's flippant responses on cross-examination also provided the State with fodder for its characterizations of Martin during closing arguments.

Upon balancing all of these factors, we conclude any misconduct during closing arguments by the prosecution did not create sufficient prejudice to rise to the level of depriving Martin of a fair trial. *See id.* at 876. Because "[t]rial counsel has no duty to raise an issue that has no merit," Martin's ineffective-assistance-of-counsel claim fails both as to his trial and appellate counsel on this issue. *Id.* at 881.

B. Evidence of prior murders.

Martin next argues his counsel was ineffective in allowing irrelevant testimony regarding prior murders that occurred in his home before the Martin family lived there. Martin speculates that such a reference "encouraged the jury to think of Mr. Martin as a murderer and left them to wonder what his connection to those murders was." The State responds this evidence was relevant to show the pastor's role in Martin's family life, as the pastor was called to bless the house. In addition, the State points to testimony by Martin's trial counsel during the postconviction relief proceedings that this evidence had no bearing on the outcome of Martin's case. In order to demonstrate prejudice under our rules of ineffective assistance of counsel, the defendant must show prejudice sufficient to undermine confidence in the outcome of the case. *Id.* at 882. We conclude Martin cannot show the required prejudice to support his claim regarding this evidence.

C. Failure to move for acquittal on malice aforethought.

Martin next argues his counsel should have moved for a judgment of acquittal on the issue of insufficient evidence of malice aforethought. York was murdered under gruesome circumstances—the evidence showed repeated hitting and strangulation, with all injuries apparently aimed toward the death of the child. Our supreme court has found such evidence sufficient to support a finding of malice aforethought: "The multiple wounds refute any suggestion of inadvertence or mistake and supply strong evidence of malice and intent to kill." *State v. Poyner*, 306 N.W.2d 716, 718 (Iowa 1981). While in that case, the defendant used a five-inch blade to stab the victim; we conclude the use of fists and strangulation of a child is likewise action tending to show malice. *See id.* In a similar case, our supreme court found evidence of malice aforethought when a six-year-old boy was strangled:

> Malice means that condition of mind which prompts one to do a wrongful act intentionally without legal justification of excuse. The uniform holding of this court is that the deliberate, violent use of a deadly weapon or an instrument likely to cause death with opportunity to deliberate is evidence of malice, deliberation, premeditation, and intent to kill. Malice and a criminal intent are inferred from the intentional use of a deadly weapon in a deadly manner unless the circumstances in evidence rebut the presumption.
>
> . . . .
>
> The hands and fists of the defendant violently used to strangle and beat to death this six year old child constituted an instrument likely to produce death and were dangerous weapons. Clearly this assignment of error [that the defendant lacked deliberation and premeditation] must be rejected. In the case of *State v. Sullivan*, 51 Iowa 142, 50 N.W. 572, [(1879)] the following instruction was approved: "when a man assaults another with, or uses upon another, a deadly weapon, in such a manner that the natural, ordinary, and probable result of the use of such deadly weapon in such manner would be to take life, the law presumes that such person so assaulting intended to take life."

State v. Heinz, 275 N.W. 10, 20–21 (Iowa 1937) (internal citations omitted); *see also State v. Rhode*, 503 N.W.2d 27, 39 (Iowa Ct. App. 1993) (holding slamming of child's head against a hard, flat, surface, when coupled with defendant's prior treatment of victim and commission of child endangerment resulting in death generates substantial evidence of malice aforethought, and that "malice may be implied from the commission of a felony which results in death").

We conclude the evidence of extreme, repeated force on a three-year-old child in this case provides substantial evidence supporting the jury's finding of malice aforethought. *See Heinz*, 275 N.W. at 21. Martin's counsel therefore was not ineffective in failing to move for judgment of acquittal on this ground.

D. Concession regarding custody.

Martin next argues his appellate counsel was ineffective in conceding he was not in custody during his second interaction with police. Because we find no prejudice resulted from the concession, counsel was not ineffective in making this concession.

In his brief, Martin initially argues that both his second and third interaction with police should have been suppressed. Martin's argument is raised in the context of an ineffective-assistance-of-counsel claim relating to his appellate attorney's concession that he was not in custody during the second interaction. *See Martin*, 2004 WL 1836122 at *2. Our court in that case found no interrogation occurred during the third interaction involving Father Cade, and ruled his statements to Father Cade were properly admissible. *Id.* at *3. We therefore restrict our inquiry to the second interaction.

We first consider whether Martin was prejudiced by the alleged error of his appellate counsel. *See State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006) (holding we need not evaluate whether counsel rendered deficient performance if no prejudice resulted from the alleged error). Martin argues that several of his statements were improperly admitted—however, only one of the statements he argues was improperly admitted resulted from the second interaction with police. When asked by police whether he had a history of blackouts, Martin responded that he did not. At trial, Martin told the jury he had blackouts.

The prejudice prong of our ineffective-assistance-of-counsel inquiry requires that Martin show a reasonable probability that but for his appellate counsel's alleged error, the outcome of the proceeding would have been different. *Graves*, 668 N.W.2d at 882. We look to the whole evidence, the factual findings affected by the alleged error, and whether "the effect was pervasive or isolated and trivial." *Id.* at 883.

Martin's inconsistent statements about a history of blackouts were used by the State as proof his testimony was not credible. The State presented to the jury many inconsistent statements by Martin. The effect of this statement was cumulative. We find no prejudice from its admission into evidence and therefore no merit to Martin's ineffective-assistance-of-appellate-counsel claim. *See Tate*, 710 N.W.2d at 240.

E. Cumulative error.

Because we found no merit in Martin's underlying points of error, we decline to find the points of error when considered as a whole generated cumulative error. *State v. Artzer*, 609 N.W.2d 526, 532 (Iowa 2000) ("Having

found each of the underlying claims to have no merit individually, we reject the claim of cumulative error.").

AFFIRMED.