

IN THE COURT OF APPEALS OF IOWA

No. 7-149 / 06-1048
Filed June 13, 2007

ARCHIE ROBERT BEAR,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Poweshiek County, Daniel F. Morrison, Judge.

Applicant appeals following the district court's denial of his application for postconviction relief. **AFFIRMED.**

Catherine K. Levine, Des Moines, for appellant.

Archie Robert Bear, Anamosa, pro se.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Michael W. Mahaffey, County Attorney, and James Kivi, Assistant County Attorney, for appellee State.

Considered by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

Archie Robert Bear appeals following the denial of his application for postconviction relief. He contends the postconviction court erred in concluding he was not prejudiced by his trial counsel's failure to object to prosecutorial misconduct. We affirm.

I. Background Facts and Proceedings

On the evening of February 5, 1999, Bear, Daryl Triplett, Max Purk, and his nephew, Jeremy Purk, met at a bar in Toledo, Iowa. The foursome drove to Grinnell, Iowa, in Bear's two-door vehicle for an evening of "barhopping." The group went to three different bars where they all drank beer and liquor. They left the last bar at approximately 2:00 a.m. in Bear's vehicle. All four men were intoxicated and arguing about whether Bear should be driving.

According to Jeremy Purk, the argument escalated into a physical confrontation between Bear and Max Purk. Jeremy stated Bear initiated the confrontation by turning around in the driver's seat while driving and swinging at Max, who was sitting in the back seat directly behind Bear. He further stated Max reacted by shoving the driver's seat forward and hitting Bear. According to Jeremy, Bear stopped the vehicle and exited through the passenger-side door, as did Max. At Bear's trial, Jeremy testified Bear "sliced Max's throat . . . as soon as [Max] got out of the car." Triplett confirmed the confrontation outside the vehicle occurred very quickly, although he did not "actually see Max get cut." Triplett drove Max to the hospital, where he died from the knife wound.

The State filed a trial information charging Bear with first-degree murder. Bear relied on the defense of justification at trial and took the stand in his own

defense. Bear testified Max initiated the altercation by pushing the driver's seat forward, pinning him against the steering wheel, and punching him. Triplett likewise testified Max started the confrontation by shoving the driver's seat forward and hitting Bear. Bear testified he stopped the vehicle and pulled out a pocket knife. According to Bear, Max exited the vehicle before him through the driver-side door. Bear testified Max pulled him out of the vehicle, held him against the driver-side door, and continued punching him. Max broke Bear's nose at some point during their confrontation. Bear testified he "took a swing" at Max with his knife to protect himself from further injury.

During cross-examination, the prosecutor asked Bear whether Jeremy was "wrong" about which door Bear and Max used to exit the vehicle. When Bear responded affirmatively, the prosecutor asked: "And he's not only wrong, he's lying, isn't he?" Bear's trial counsel did not object.

During closing argument, the prosecutor commented "the only way you can find Archie Robert Bear not guilty is if you believe what he said." He later reiterated the jury would "have to believe that things happened the way Archie Bear said it happened in order for there to be justification. You have to believe that he was being almost beaten to death." In the rebuttal portion of the prosecutor's closing argument, he stated: "If you believe Jeremy Purk, the defendant is guilty of murder in the first degree." Bear's trial counsel did not object to any of these statements.

The jury returned a verdict finding Bear guilty of the lesser-included offense of second-degree murder. The district court sentenced Bear to an indeterminate fifty-year term of incarceration. Bear appealed, challenging the

sufficiency of the evidence supporting his conviction. We rejected Bear's claim on direct appeal and affirmed his conviction. *State v. Bear*, No. 00-0558 (Iowa Ct. App. March 28, 2001).

Bear subsequently filed an application for postconviction relief. He claimed his trial counsel was ineffective for failing to object to the prosecutor's cross-examination of Bear regarding the veracity of Jeremy Purk and for failing to object to statements made by the prosecutor during closing argument. Relying on *State v. Graves*, 668 N.W.2d 860 (Iowa 2003), the postconviction court found the prosecutor engaged in misconduct by asking Bear whether the State's witness lied and by making the above-quoted statements during closing argument.¹ The court concluded the prosecutor's misconduct and the failure of trial counsel to object to the improper questioning and statements did not prejudice Bear. The postconviction court accordingly denied Bear's application for postconviction relief. Bear appeals.

II. Scope of Review

Postconviction proceedings are generally reviewed for the correction of errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when an applicant raises issues of constitutional dimension, our review is de novo. *Id.*

III. Discussion

On appeal, Bear contends the postconviction court should have granted his application for postconviction relief. He contends he was prejudiced by his

¹ The trial court found the prosecutor's statements during closing argument were improper because they "distorted the burden of proof."

trial counsel's failure to object to the prosecutor's improper cross-examination of him regarding the veracity of a State's witness and for failing to object to statements made by the prosecutor in closing argument.

In *Graves*, our supreme court held a prosecutor engages in misconduct by asking the defendant at trial whether other witnesses are lying, calling the defendant a liar, stating the defendant is lying, or making other similar, disparaging comments. *Id.* at 873, 876. In order to show trial counsel was ineffective for failing to object to such conduct, Bear must establish: (1) trial counsel failed to perform an essential duty and (2) this omission resulted in prejudice. *Id.* at 869. "A defendant's inability to prove either element is fatal." *Id.*

The controlling factor supporting prejudice in *Graves* was the "pervasive manner in which the error was used to obtain a conviction." *Nguyen v. State*, 707 N.W.2d 317, 324 (Iowa 2005). In *Graves*, the prosecutor's improper cross-examination and argument "was not isolated, but rather became a central theme of the government's prosecution." *Graves*, 668 N.W.2d at 878-79 (finding pervasive misconduct where the prosecutor aggressively cross-examined the defendant with "liar" questions, told the jury in closing argument the defendant called the State's witness a liar, and repeatedly referred to the defendant as a liar); see also *Bowman v. State*, 710 N.W.2d 200, 206 (Iowa 2006) (finding prejudice existed where the prosecutor engaged in improper questioning "at least eight different times" and "initiated an all-out, name-calling attack" on the defendant's credibility during closing argument).

In this case, the State concedes the prosecutor's "was he lying" question to Bear during the evidence portion of the trial was improper based on our

supreme court's pronouncements in *Graves*; however, the State argues Bear suffered no prejudice. Upon our review of the record, we agree.

The prosecutor's question about the veracity of Jeremy Purk's testimony was a single, isolated incident and was not revisited in closing argument. Unlike *Graves* and *Bowman*, the prosecutor here did not improperly resort to "inflammatory characterizations" of Bear's testimony by referring to Bear as a liar or by contending Bear called the State's witness a liar. See *State v. Carey*, 709 N.W.2d 547, 558 (Iowa 2006) (recognizing "it is the use of the word 'liar' itself" that is inflammatory and improper); *Nguyen*, 707 N.W.2d at 325 (noting prejudice does not depend upon the fact the State raised the issue of defendant's credibility, but upon the manner in which it was done). The cross-examination misconduct in this case was neither severe nor pervasive. Thus, in contrast to *Graves* and *Bowman*, the issue of lying did not become a central theme in this case. Moreover, the State's case was fairly strong. See *Nguyen*, 707 N.W.2d at 327 (determining defendant did not establish prejudice where the prosecutor "did not engage in any name-calling tactics" and the evidence against the defendant was strong). We conclude it is not reasonably probable the result of the defendant's trial would have been different had the disputed cross-examination been excluded. *Carey*, 709 N.W.2d at 560. Therefore, Bear has failed to establish he was prejudiced.

We now turn to the prosecutor's statements during closing argument. Bear complains of three "if you believe" statements made by the prosecutor during closing argument, which we described earlier in this opinion. During his argument, the prosecutor did not refer to any witness as a liar, and he did not

resort to inflammatory characterizations of Bear's testimony. Instead, he reviewed all the evidence and invited the jury to decide what evidence to believe. Both the prosecutor and defense counsel brought the issue of witness credibility squarely before the jury. See *Nguyen*, 707 N.W.2d at 325 (holding that a prosecutor may generally inquire into the credibility of a witness on cross-examination and refer to that credibility in closing argument, where the prosecutor may draw conclusions and argue permissible inferences that reasonably flow from the evidence presented). Under the circumstances, it is not particularly surprising that an experienced defense attorney chose not to object to the "if you believe" statements made by the prosecutor during final argument. However, even if we assume, as Bear argues, that such statements were improper because they "distorted the burden on proof" in some manner, we do not believe the statements were sufficiently prejudicial to require a new trial.

The three statements of which Bear complains were a small part of a thorough and otherwise legitimate discussion of the evidence presented at trial. The court's jury instructions clearly informed the jury that the State's burden was beyond a reasonable doubt on every issue, the law of the case was found in the instructions given by the court, and the lawyers' arguments and statements were not evidence. There is no dispute that Bear cut Max Purk's throat, that he intended to cut (but not kill) Max, and that he used great force in doing so. It is also undisputed that Bear caused Max's death. The disputed element of second-degree murder was Bear's defense of justification. In Bear's direct appeal, this court determined there was substantial evidence in the record from which a jury could find Bear initiated or continued the altercation, thereby defeating his

defense of justification. Upon our review, we conclude it is not reasonably probable the result of the proceeding would have been different if the prosecutor's disputed statements during final argument had been excluded.

IV. Conclusion

Because we conclude Bear failed to prove he was prejudiced by trial counsel's failure to object to prosecutorial misconduct, we affirm the district court's decision to deny his application for postconviction relief.

AFFIRMED.