**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1007**

Troy Wade Breckenridge, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed June 3, 2008**
**Affirmed**
**Peterson, Judge**

Olmsted County District Court
File No. K1-04-2374

Lawrence Hammerling, Chief Appellate Public Defender, Jodi L. Carlson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mark A. Ostrem, Olmsted County Attorney, Katherine M. Wallace, Senior Assistant County Attorney, 151 Southeast Fourth Street, Rochester, MN 55904 (for respondent)

Considered and decided by Wright, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

## U N P U B L I S H E D  O P I N I O N

**PETERSON,** Judge

In this appeal from the summary denial of his petition for postconviction relief, appellant argues that he is entitled to (1) a *Schwartz* hearing, (2) an evidentiary hearing on his claim that his counsel's failure to request a *Schwartz* hearing was ineffective assistance, and (3) a new trial because the prosecutor engaged in misconduct during trial. We affirm.

## FACTS

Appellant Troy Wade Breckenridge was charged with a felony-level violation of an order for protection (OFP). Appellant stipulated that his past offenses made the charged offense a felony, and the state moved to admit evidence of appellant's prior convictions (one for domestic assault and one for violating an OFP) under Minn. Stat. § 634.20 (2006). The district court denied the state's motion.

At trial, the victim, appellant's ex-wife, testified that in January 2003, she obtained an OFP that prohibited appellant from contacting her. She testified that during April 2004, appellant left several messages for her at work and spoke to her once. She testified that she knew that appellant was the person who spoke to her because she recognized his voice. During cross-examination, appellant's counsel asked the victim, "[O]ther than [the phone call in April] you had talked to -- you had not talked to [appellant] for a number of months prior to April of 2004, correct?" The victim answered, "Correct." On redirect, the following exchange between the prosecutor and the victim occurred:

> Q: . . . [P]rior to the phone contact in April, you indicated when you last had contact with [appellant]. I didn't catch that date.
> A: That was August.
> Q: August of?
> A: 2003.
> Q: And where did that contact occur?
> A: My apartment.
> Q: And in August of 2003, was the order for protection in place?
> A: Yes, it was.
> Q: And who initiated the contact in August of 2003?
> A: [Appellant].
> Q: Was law enforcement contacted?
> A: Yes, they were.

At this point, appellant's counsel objected, stating, "We're getting into irrelevant and prejudicial," and the district court sustained the objection.

The victim's coworker testified that he received a telephone call at work from a man who identified himself as Troy and asked to speak to his wife. When the coworker asked for the wife's name, the caller used the victim's first name to identify the victim as his wife. The coworker handed the phone to the victim, who said hello, looked panicked, and hung up. The coworker testified that the same person called five to seven times during the next two weeks.

After this testimony, the district court told the parties that it had received a note from one of the jurors "suggesting that she's familiar with the alleged victim and based upon her prior contact with the alleged victim she has serious doubts as to whether she could be . . . impartial." The district court and the parties agreed that the juror should be excused. The district court explained to the jury: "[O]ne of the jurors discovered that she

knew one of the witnesses that's testified already, and as a result of that discovery we felt it appropriate that she be discharged."

Appellant testified and admitted that he was aware of the OFP, but he denied calling the victim in April 2004. He testified that the last time he had contact with the victim was August 20, 2003. During cross-examination, the prosecutor questioned appellant about his contact with the victim on August 20, as follows:

> Q: . . . [Y]ou indicated that the last time you had contact with [the victim] was August 20th of --
> A: Correct.
> Q: And that was in violation of the restraining order, correct?
> A: Yes, correct.
> Q: And you initiated that contact, correct?
> A: Technically she did. Be prior to that. But I wanted to know what was going on with us. That's why I initialized (sic) it, went over there to try to talk to her.
> Q: So you went to her apartment.
> A: Yes.
> Q: And at that time you were aware that there was an order for --
> A: Yes, there was.

Appellant's counsel did not object to this cross-examination, but on redirect, appellant's counsel elicited from appellant testimony that appellant learned from his August 2003 contact with the victim not to violate the OFP again.

The jury found appellant guilty, and he was convicted and sentenced. Appellant did not file a direct appeal. In January 2007, appellant filed a petition for postconviction relief, seeking reversal of his conviction and a new trial. Appellant also requested a *Schwartz* hearing. The district court denied appellant's petition in its entirety without holding an evidentiary hearing. This appeal followed.

## D E C I S I O N

In a postconviction proceeding, the petitioner "has the burden of establishing, by a fair preponderance of the evidence, facts which warrant a reopening of the case." *Hanley v. State*, 534 N.W.2d 277, 278 (Minn. 1995) (quotation and citation omitted). "An evidentiary hearing is not required unless petitioner alleges facts which, if proven, would entitle petitioner to the requested relief." *Id.* Appellate review of postconviction proceedings "is limited to whether there is sufficient evidence in the record to sustain the findings of the postconviction court." *Id.* "Absent an abuse of discretion, a postconviction court's decision will not be disturbed." *Id.*

*1. Schwartz hearing*

A criminal defendant who suspects a guilty verdict was tainted by juror misconduct may make a posttrial motion for a *Schwartz* hearing. *State v. Pederson*, 614 N.W.2d 724, 730 (Minn. 2000). A *Schwartz* hearing can be used to discover "whether extraneous prejudicial information was considered by the jury, whether an outside influence was brought to bear on a juror, or whether threats of violence--either from outside the jury or among the jury members themselves--affected the verdict[,]" as well as whether a juror concealed a prejudice or bias during voir dire that may have disqualified the juror from service. *Id.* at 731. The burden is on the defendant to establish a prima facie case of jury misconduct. *Id.* at 730. "To establish a prima facie case, a defendant must submit sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *Id.* (quotation omitted). Denial of a *Schwartz* hearing is reviewed for an abuse of discretion. *Id.*

In his postconviction petition, appellant requested a *Schwartz* hearing "to determine whether [the excused juror] made any comments about the victim to any of the other jurors, which may have influenced their verdict." The district court concluded that appellant waived any alleged juror misconduct by waiting for a verdict before claiming error and that appellant failed to set forth prima facie evidence of juror misconduct. Appellant did not submit any evidence or allege any fact that, if proved, would warrant the conclusion that the jury committed misconduct or was exposed to any extraneous prejudicial information or outside influence. There is no evidence that the jury knew which witness the excused juror knew or whether the excused juror's opinion of the witness was positive, negative, or neutral. Because appellant failed to establish a prima facie case of juror misconduct, the district court did not abuse its discretion in denying his motion for a *Schwartz* hearing.

*2. Denial of evidentiary hearing*

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that his attorney's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for the attorney's errors, the outcome of the proceeding would have been different. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Dukes v. State*, 660 N.W.2d 804, 810-11 (Minn. 2003). An attorney's decision not to move for a

*Schwartz* hearing is not unreasonable when the record gives no indication of jury misconduct. *Dunn v. State*, 499 N.W.2d 37, 38 (Minn. 1993).

Appellant requested an evidentiary hearing "to develop the record on the issue of whether counsel rendered ineffective assistance by failing to request a [*Schwartz*] hearing during the trial." The district court denied appellant's request, concluding that because there was no evidence of any juror misconduct, his attorney's decision not to move for a *Schwartz* hearing was not unreasonable. Because there is no evidence of jury misconduct and failing to move for a *Schwartz* hearing when there is no evidence to support the motion does not fall below an objective standard of reasonable attorney performance, the district court did not abuse its discretion by denying appellant's ineffective-assistance claim without an evidentiary hearing.

*3. Prosecutorial misconduct*

Appellant argues that the prosecutor engaged in misconduct by asking questions about appellant's prior violation of the OFP after the district court denied the state's motion to admit evidence of appellant's conviction for the prior violation. The district court concluded that the prosecutor's inquiries were not misconduct because defense counsel opened the door to the prosecutor's questions about the earlier violation when counsel asked the victim whether it was correct that she had not talked to appellant for a number of months before April 2004 and when defense counsel asked appellant when was the last time that he had contact with the victim. The district court also concluded that "[e]ven if the prosecutor's questioning amounted to misconduct, it was not so prejudicial as to warrant a reversal."

> [B]efore an appellate court reviews an unobjected-to error, there must be (1) error; (2) that is plain; and (3) the error must affect substantial rights. If these three prongs are met, the appellate court then assesses whether it should address the error to ensure fairness and the integrity of the judicial proceedings.

*State v. Ramey*, 721 N.W.2d 294, 298 (Minn. 2006) (quoting *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998)). The plain-error doctrine applies to prosecutorial misconduct that is not objected to at trial. *Id.* at 299. When applying the plain-error doctrine to prosecutorial misconduct, the burden is on the defendant "to demonstrate both that error occurred and that the error was plain." *Id.* at 302. When prosecutorial misconduct reaches the level of plain or obvious error, the burden shifts to the state to demonstrate that the misconduct did not prejudice the defendant's substantial rights. *Id.* at 299-300.

An appellate court "will reverse only where the misconduct, viewed in light of the entire record, is of such serious and prejudicial nature that appellant's constitutional right to a fair trial was impaired." *State v. Robinson*, 604 N.W.2d 355, 361 (Minn. 2000). "The state may prove all relevant facts and circumstances which tend to establish any of the elements of the offense with which the accused is charged, even though such facts and circumstances may prove or tend to prove that the defendant committed other crimes." *State v. Drews*, 274 Minn. 426, 430, 144 N.W.2d 251, 254-55 (1966). But the state cannot use evidence of prior misconduct to establish a defendant's propensity to engage in specific conduct. *State v. Langley*, 354 N.W.2d 389, 396 (Minn. 1984).

The two series of questions that appellant claims were misconduct were not objected to at trial.[1] In both instances, the prosecutor's questions were related to the last time that appellant had contact with the victim before the April 2004 incident and followed questions by defense counsel about the last time that appellant had contact with the victim. The first series of questions occurred after defense counsel asked the victim to confirm that, before the phone calls in April, she had not had contact with appellant for "a number of months," and the second series of questions occurred after defense counsel asked appellant to confirm that he had not had contact with the victim since August 20, 2003. The prosecutor's questions did not reveal to the jury that appellant had been convicted for violating the OFP on August 20, and the prosecutor did not use the elicited testimony to argue that appellant had a propensity to violate the OFP and only referred to the August 20 incident in closing argument as evidence that appellant knew that the OFP existed. Because appellant has failed to show that asking the questions that he now objects to constituted prosecutorial misconduct and that allowing the questions when there was no objection was plain error, the district court did not abuse its discretion in denying appellant postconviction relief on the ground of prosecutorial misconduct.

**Affirmed.**

[1] Appellant claims that he objected to the questions that the prosecutor asked the victim on redirect. But the objection that appellant cites was sustained; the questions that he now claims were misconduct were asked and answered before his objection. The record does not indicate that appellant objected to these questions.