STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1575

State of Minnesota,
Respondent,

vs.

Steven E. Jahnke,
Appellant.

Filed April 22, 2008
Affirmed
Kalitowski, Judge

Aitkin County District Court
File No. K3-03-712

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

James P. Ratz, Aitkin County Attorney, Aitkin County Courthouse, 209 Second Street Northwest, Aitkin, MN 56431 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Kalitowski, Judge; and Connolly, Judge.

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

KALITOWSKI, Judge

Appellant Steven E. Jahnke was convicted of one count of fourth-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. Appellant challenges the district court's denial of his posttrial motion, arguing that the district court abused its discretion by refusing to grant a new trial or a *Schwartz* hearing based on evidence of alleged jury misconduct. Appellant also argues that the district court deprived appellant of his right to present a complete defense by excluding the testimony of his proposed expert witness. We affirm.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by refusing to grant a new trial or a *Schwartz* hearing to evaluate the allegations of jury misconduct reported by juror D.C. and corroborated by juror D.H. We disagree.

Deciding whether to grant or deny a motion for a new trial based on allegations of juror misconduct is within the discretion of the district court and "will not be reversed unless there is an abuse of discretion." *State v. Landro*, 504 N.W.2d 741, 745 (Minn. 1993) (citation omitted). Juror misconduct may serve as the basis for granting a new trial. Minn. R. Crim. P. 26.04, subd. 1(1)(3). When a defendant suspects that jury misconduct has tainted his guilty verdict, he can make a posttrial motion for a *Schwartz* hearing to further investigate the claim. Minn. R. Crim. P. 26.03, subd. 19(6)*; Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960).

But in order to be entitled to a *Schwartz* hearing, a defendant must first establish a prima facie case of jury misconduct by presenting "sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979), *cert. denied*, 444 U.S. 973 (1979). If a defendant does, in fact, establish a prima facie case, then the district court should liberally grant his request for a *Schwartz* hearing. *State v. Church*, 577 N.W.2d 715, 720 (Minn. 1998). We review the district court's denial of a *Schwartz* hearing for an abuse of discretion. *State v. Wilson*, 535 N.W.2d 597, 606 (Minn. 1995); *Church*, 577 N.W.2d at 721.

The evidence that the district court may consider at a *Schwartz* hearing is limited. *State v. Buchmann*, 380 N.W.2d 879, 883 (Minn. App. 1986). Minn. R. Evid. 606(b) prohibits jurors from testifying about their thought processes in determining guilt during jury deliberations. *State v. Martin*, 614 N.W. 2d 214, 226 (Minn. 2000). But the rule provides an exception to this prohibition that allows jurors to testify "as to any threats of violence or violent acts brought to bear on jurors, from whatever source, to reach a verdict." Minn. R. Evid. 606(b).

Here, juror D.C. contacted defense counsel approximately a week after the trial and stated that her vote was influenced by pressure from one of the other jurors. D.C.'s allegations were subsequently corroborated by another juror, D.H. Appellant argues that she is entitled to a *Schwartz* hearing because the other juror's conduct amounted to "overt acts," as this term was used in *State v. Hoskins*. *See* 292 Minn. 111, 193 N.W.2d 802 (1972). We disagree. Allegations of any "overt acts" is not the standard for entitlement

to a *Schwartz* hearing. *Hoskins*, 292 Minn. at 126-27, 193 N.W.2d at 812. The committee comments to Minn. R. Evid. 606(b) and a number of appellate decisions have instructed district courts to "distinguish between testimony about psychological intimidation, coercion, and persuasion, which would be inadmissible, as opposed to express acts or threats of violence." Minn. R. Evid. 606(b) cmt.; *State v. Jackson*, 615 N.W.2d 391, 396 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000); *State v. Fitzgerald*, 382 N.W.2d 892, 896 (Minn. App. 1986), *review denied* (Minn. Apr. 24, 1986).

Although the allegations made by juror D.C. were "overt acts" in the sense that they were witnessed by D.H., they did not meet the higher "violence or threat of violence" threshold for determining what constitutes a coercive overt act set forth in Minn. R. Evid. 606(b). *See also Hoskins*, 292 Minn. at 126-27, 193 N.W.2d at 812-13. The record indicates that the statements that D.C. and D.H. made to the defense investigator stated that one of the other jurors paced the room, was particularly vocal, prevented D.C. from asking the court for clarification on a question during jury deliberations, and threatened to wait it out until D.C. changed her vote. Standing alone and unchallenged, these statements at most constitute "psychological intimidation, coercion, and persuasion," which is not enough to justify impeachment of the jury's verdict. *Jackson*, 615 N.W.2d at 396.

In sum, because appellant's allegations of jury misconduct did not involve violence or threats of violence, and because Minn. R. Evid. 606(b) prohibits the district court from inquiring into issues of psychological pressure and intimidation on a motion

for a new trial or a *Schwartz* hearing, we conclude that the district court's denial of appellant's posttrial motion was within its discretion.

II.

Appellant contends that the district court abused its discretion, and thereby deprived appellant of his right to present a complete defense, by excluding the expert testimony of psychiatrist Dr. Cronin. We disagree.

Although both the United States Constitution and the Minnesota Constitution guarantee criminal defendants the right to present a meaningful defense, criminal defendants are nonetheless required to "establish the relevance and admissibility of the evidence." *State v. Svoboda*, 331 N.W.2d 772, 775 (Minn. 1983); U.S. Const. amends. VI, XIV; Minn. Const. art. I, § 7. We review the district court's evidentiary rulings for a clear abuse of discretion, even when a defendant alleges deprivation of his constitutional rights. *See, e.g.*, *State v. Profit*, 591 N.W.2d 451, 463 (Minn. 1999). And if we conclude that the district court erred in excluding evidence, we apply a harmless error analysis to determine whether reversal is required. *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994).

Expert testimony is generally admissible if it is shown to be helpful to the jury in understanding the evidence or in resolving factual disputes. Minn. R. Evid. 702; *State v. Myers*, 359 N.W.2d 604, 609 (Minn. 1984); *State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980) (explaining that "[t]he basic requirement of Rule 702 is the helpfulness requirement."). But even relevant evidence may be excluded by the district court pursuant to Minn. R. Evid. 403 if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. And

Minnesota courts have routinely recognized that expert testimony in the form of profile evidence is inadmissible, rejecting such evidence as irrelevant, not generally accepted in the psychiatric community, and confusing to the jury. *Fitzgerald*, 382 N.W.2d at 894-95; *State v. Roberts*, 393 N.W.2d 385, 388-89 (Minn. App. 1986).

Here, appellant proffered the expert testimony of psychiatrist Dr. Cronin, who examined appellant and would testify that appellant's personality does not fit the profile of a sex offender of children. But as discussed above, such testimony is inadmissible under Minnesota law. *Id.* Appellant contends that the state failed to timely object to his expert's testimony and that he was prejudiced by the state's late objection because his trial counsel referred to Dr. Cronin's testimony in his opening statement. We disagree.

The record shows that counsel for appellant did not make an offer of proof explaining the nature of the testimony he sought to elicit from Dr. Cronin until mid-trial. Thus, the prosecutor had no basis for an earlier objection. And in light of the caselaw concerning psychological profiling, it was appellant's responsibility to get a pretrial ruling on the admissibility of his expert's testimony before referring to it in his opening statement. In addition, the record indicates that appellant turned down the district court's offer to give a curative jury instruction regarding the exclusion of the earlier-promised evidence. Thus, we conclude that any prejudice that may have resulted from appellant's failure to produce the evidence mentioned during his opening statement was not caused by the state.

Appellant argues his expert's testimony was admissible and attempts to distinguish *Roberts* by pointing out that the expert at issue in *Roberts* was offered as a character

witness, whereas Dr. Cronin was offered as an expert witness. *See* 393 N.W.2d at 388. But that distinction was not made by the court in *Roberts*. *See id.* Moreover, the testimony excluded as inadmissible profile evidence in *Fitzgerald* was offered as expert-witness testimony. 382 N.W.2d at 894-95. Therefore, appellant's argument that his expert's testimony was admissible fails.

Because the district court did not abuse its discretion by excluding the expert's testimony about whether appellant's personality fit the profile of a sex offender of children, we conclude that appellant was not deprived of his right to present a complete defense.

Affirmed.