STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0022

State of Minnesota,
Respondent,

vs.

Curtis Antonio Moore,
Appellant.

Filed February 10, 2009
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. K9071574

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 1800 Bremer Tower, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

* Retired judge of the district court, serving the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

STONEBURNER, Judge

Appellant challenges his conviction of first- and third-degree criminal sexual conduct, arguing that the district court erred by failing to redact prejudicial statements made by an officer during interrogation of appellant and by failing to conduct a *Schwartz* hearing based on a juror's posttrial statements. We affirm.

FACTS

Appellant Curtis Antonio Moore and 27-year-old E.D. lived near each other in St. Paul and were acquainted. They encountered each other on University Avenue on a night in May 2007 and ended up drinking and using crack cocaine (crack) in Moore's condemned apartment where he was illegally staying. Several times during the evening, E.D. walked from Moore's apartment to her nearby home to use the bathroom because the plumbing was disconnected at Moore's apartment. E.D. lived with her mother and her mother's boyfriend.

At about 3:30 a.m., E.D.'s mother woke up when E.D. banged on the window and screamed for her mother to open the door. As her mother opened the door, E.D. rushed inside. E.D. had blood on her shirt and was not wearing pants or underwear. She said, "I've been raped," and stated that the person was right behind her. Mother's boyfriend immediately called 911.

Police responded promptly and arrested Moore, who was standing in front of E.D.'s residence with his pants unbuttoned and unzipped and his belt unbuckled. E.D. came out of the house and said, "He raped me."

St. Paul Police Sergeant Paul Schnell interviewed Moore twice at the police station. Moore was crying when Schnell met him and cried periodically throughout the first interrogation. Moore initially denied having any physical contact with E.D although he admitted that he and E.D. had been drinking and smoking crack. Eventually, in response to Schnell's statements about the evidence and research showing that crack makes people "hypersexual" and interferes with judgment and self-control, Moore admitted that "things had gotten out of control."

Moore was charged with first- and third-degree criminal sexual conduct. Before trial, Moore moved to redact portions of the recording of his first custodial interview, including Schnell's statements regarding research on the effects of crack, arguing that Schnell's remarks constituted expert testimony on a subject outside of Schnell's expertise. The district court denied the motion, holding that Schnell's statements were not being offered as an expert opinion. The district court noted that Moore could cross-examine Schnell about his knowledge of the effects of using crack.

The jury found Moore guilty. When the jury was polled, juror A.S. nodded in response. The district court directed her to answer out loud, and A.S. orally agreed with the verdict. Less than two hours after the verdict was entered, A.S. telephoned the district judge's chambers and stated that she was "not ok" with the verdict. The district court convened a hearing to advise the parties of the telephone call. At the summary hearing, Moore's attorney reported that after the trial, while he was speaking to another juror about what had influenced their decision, A.S. approached and listened to the

conversation. A.S. was crying. The first juror referenced some "personal attacks" by another juror directed to him and A.S.

The district court continued the hearing to the next day and prohibited the parties from contacting any of the jurors. At the continued hearing, Moore requested a *Schwartz* hearing[1] based on allegations of "personal attacks" during deliberations and A.S.'s telephone call to the district court. The district court denied the motion, concluding that Moore had not established a prima facie case of juror misconduct. But the district court permitted the parties to contact A.S. and told them to come back if there was additional evidence supporting a *Schwartz* hearing. On behalf of the prosecutor, a police officer contacted A.S. that day. A.S. said she was not threatened with physical violence or coerced during deliberations, but she felt "pressured" by the jurors to reach a guilty verdict. A report of this conversation was forwarded to the district court.

Months later, Moore's attorney sent the district court an investigator's report of a conversation with A.S. A.S. told the investigator that she did not believe that there was enough evidence to convict Moore and she felt pressured to change her vote to "guilty." She stated that she was not coerced or physically threatened but noted that one juror made "highly inappropriate" personal attacks against another juror. She also stated that one of the sequestered jurors had left the hotel to move his car. Neither party moved for a *Schwartz* hearing based on the additional conversations with A.S.

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[1] A *Schwartz* hearing is a procedure to be used when there is an allegation of juror misconduct. *State v. Kelley*, 517 N.W.2d 905, 908 n.2 (Minn. 1994) (citing *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960)). Jurors are examined in the presence of counsel, on the record and under oath, to determine whether misconduct occurred and, if so, whether it was prejudicial. *Id*.

On appeal, Moore challenges the district court's failure to redact Schnell's statements about research on the effects of crack and failure to conduct a *Schwartz* hearing as reversible error.

D E C I S I O N

I. Admission of Schnell's statements made during Moore's interrogation is not reversible error

An appellant challenging an evidentiary ruling, "has the burden of establishing that the trial court abused its discretion and that the error was prejudicial." *State v. Vance*, 714 N.W.2d 428, 436 (Minn. 2006) (citing *Huff v. State*, 698 N.W.2d 430, 435 (Minn. 2005)). "When police interviews with a defendant are admitted, statements by police during the interviews are generally admissible to give context to the defendant's statements." *Id.* at 443.

Moore specifically objects to Schnell's reference to "research" demonstrating that crack makes users "hypersexual," arguing that the statement, which resembled expert testimony, did not provide any special context for Moore's statements and was prejudicial. Schnell was not cross-examined about the statement.

The record demonstrates that Schnell's comments prompted Moore to reveal more information about his interaction with E.D. and, therefore, were relevant to give the context of Moore's statements. The district court correctly determined that Schnell's comments were not offered as an expert opinion. Additionally, Moore admitted that he and E.D. smoked crack, had sex, and that "[s]tuff got out of control"; therefore, it is highly unlikely that Schnell's comments influenced the jury's decision to convict. On

this record, we conclude that Moore failed to demonstrate that the district court abused its discretion by admitting the unredacted statement, or that admission of Schnell's brief reference to research about the effects of crack use was prejudicial.

For the first time on appeal, Moore argues that the district court should have given a cautionary instruction, but Moore did not request a cautionary instruction at trial. In the absence of a request for a jury instruction, we apply a plain-error analysis. "Ordinarily it is not plain error for the trial court to fail to *sua sponte* give [a cautionary] instruction." *Vance*, 714 N.W.2d at 442–43. And Moore has failed to show that this case requires a different conclusion.

II. The district court did not err by failing to conduct a *Schwartz* hearing

Jury misconduct can be a basis for a new trial. Minn. R. Crim. P. 26.04, subd. 1(3). An exception to the general prohibition on an inquiry into the validity of a verdict allows a juror 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).

Generally, the granting or denying of a *Schwartz* hearing to determine the existence and effect of jury misconduct is a matter of discretion for the trial court. *State v. Rainer*, 411 N.W.2d 490, 498 (Minn. 1987). We review the denial of a *Schwartz* hearing for abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998). A defendant must establish a prima facie case of jury misconduct before a *Schwartz* hearing is mandated. *State v. Larson*, 281 N.W.2d 481, 484 (Minn. 1979). "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.*

Evidence of psychological intimidation, coercion, and persuasion is not admissible to show juror misconduct. *State v. Jackson*, 615 N.W.2d 391, 396 (Minn. App. 2000) (citing Minn. R. Evid. 606(b) cmt. stating that "trial court must distinguish between testimony about 'psychological' intimidation, coercion, and persuasion . . . as opposed to express acts or threats of violence"), *review denied* (Minn. Oct. 17, 2000). Because there is no evidence of any express act or threat of violence in this case, we conclude that the district court did not abuse its discretion in denying a *Schwartz* hearing.

Moore argues, without citing authority, that permitting counsel to contact juror A.S. "was contrary to the established law." We agree that the better procedure would have been for the district court to have interviewed A.S. in the presence of counsel, but we cannot conclude that the district court violated established law by permitting counsel to contact A.S. and to renew the request for a *Schwartz* hearing based on additional information if warranted.

Moore also argues that by not allowing counsel to contact other jurors, the district court frustrated counsel's ability to fully explore whether misconduct occurred. And Moore asserts that the additional information that his investigator obtained from A.S. about a sequestered juror having left the hotel to move a car, entitles him to a *Schwartz* hearing. But Moore never sought the district court's permission to contact other jurors and did not renew his request for a *Schwartz* hearing based on the information received from A.S. We conclude that Moore has waived his right to appeal these issues that were not raised in the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996)

(stating that this court will generally not consider matters not argued to and considered by the district court). Moore's pro-se reply brief does not raise any additional issues.

Affirmed.