**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A17-0571**

State of Minnesota,
Respondent,

vs.

Robert John Kaiser,
Appellant.

**Filed May 29, 2018**
**Affirmed**
**Jesson, Judge**

Stearns County District Court
File No. 73-CR-14-7529

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Janelle Kendall, Stearns County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Schellhas, Judge; and Reyes, Judge.

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

**JESSON**, Judge

Appellant Robert Kaiser cared for his infant child in the days and hours prior to the child becoming unresponsive and in need of emergency medical care. The child was

rushed to the hospital, where doctors discovered he was suffering from a serious brain injury, likely caused by non-accidental trauma. While in the hospital, the child's condition worsened, he contracted a severe intestinal infection, and he died. Kaiser was convicted of two counts of second-degree felony murder, with third-degree assault and malicious punishment of a child as the underlying felonies. Kaiser appeals these convictions, arguing the district court erred by suppressing evidence that was important to the defense's theory at trial, by providing inaccurate jury instructions, and by denying a *Schwartz* hearing to determine if there was juror misconduct. We affirm.

## FACTS

Appellant Robert Kaiser and mother, G.K., met in September 2013 and began a romantic relationship. G.K. was still legally married to another man but separated, and she had a child. Shortly after the relationship with Kaiser began, G.K. found out she was pregnant, and she and her older child moved in with Kaiser. The couple's child, W.K., was born June 24, 2014.

For approximately the first month of the child's life, his mother was the primary caregiver. During most of this time the child was healthy, but he did have one incident where he fell out of a stroller when he was four to five weeks old. Another time he had bruises on his arm. When the child was approximately eight weeks old, he began to vomit two to three times a day, but this vomiting stopped after four to five days. Doctors would later determine that the child sustained rib fractures during this time.

Mother had to go back to work a week earlier than she had planned and daycare was not scheduled to start until the following week. During this week-long gap, the couple

planned that Kaiser would provide the child's care. For the first two days of this week, Kaiser watched the child throughout the day, mother took over in the evenings when she got home from work, and then the child slept in Kaiser's room so he could care for him throughout the night.[1]

Halfway through the week, the child's health became a serious concern. When mother left in the morning, the child seemed fine. Kaiser ran errands with the child in the morning and then came to mother's workplace to have lunch. During lunch, mother noticed the child was pale, sweaty, and not in a good mood. Kaiser said the child had been fussy and prevented him from getting much sleep. Mother's coworkers noticed the child had a bruise on his chin.

According to Kaiser, after he and the child left mother's workplace, they returned home and the child took a nap and then took a bottle shortly before mother came home.[2] But when mother arrived at home, she noticed something was wrong with the child. When she rubbed his feet he would not respond, nor did he respond when she attempted to give him a bath. The couple took the child to the hospital in Albany and on the way, the child began to have seizures and seemed to turn blue. Staff at the hospital were unable to stabilize the child and quickly identified that the child needed a higher level of care. He was transferred by helicopter to Children's Hospital in St. Paul.

[1] The couple slept in different bedrooms.
[2] Medical experts would later testify that the child could not have taken a bottle at this time, due to his injuries.

Once at Children's Hospital, the child continued to have seizures. Doctors attempted multiple medications to stop them. The first two medications were unsuccessful, but the third, Propofol, did stop the seizures. Doctors then put the child into a medically induced coma to prevent further seizure activity, and the child was fed through a feeding tube. They performed a CT scan, which indicated that the child had subdural hematomas, a type of bleeding on the brain that is caused by ruptured veins running between the skull and the brain. The likely cause of these subdural hematomas was non-accidental trauma.

The following day Dr. Mark Hudson, a doctor who specializes in child abuse, physically examined the child and noted a bruise on the child's chin, as well as two rib fractures which were approximately four weeks old. He became concerned the child was abused. An MRI later in the day showed retinal hematomas, bleeding inside the back of the eyes, which also indicates abuse occurring within hours before his arrival at the hospital. Doctors told the parents that the child suffered trauma causing the brain injury.[3] Mother became upset with Kaiser because he was the one who cared for the child that day.

On the child's third day in the hospital, another MRI demonstrated brain damage developing from the brain injury. On the fourth day, the child underwent surgery to attempt to drain blood from his brain. And on the fifth day, the child developed abdominal distention. He underwent another surgery on the sixth day, which revealed that he had extensive necrotizing enterocolitis (NEC), a serious intestinal infection that can be fatal. The child's condition fluctuated over the following two days and he underwent another

[3] Doctors and medical experts who would later testify disagree as to how long before taking the child to the hospital the trauma occurred.

exploratory surgery, which showed worsening NEC in his bowel. On the same day, doctors determined the child's brain injury was heading toward brain death. Doctors recommended no further treatment and a withdrawal of life support, as the child's NEC condition was fatal. Mother agreed and held the child as he passed away later that day.

Due to the suspected cause of his injuries being non-accidental trauma, Stearns County Child Protection was notified and began an investigation while the child was in the hospital. Mother also attempted to determine what had caused the child's injuries. She told Kaiser it had to be one of them, and she was confident nothing happened to cause the injuries while the child was in her care. Mother urged Kaiser to tell police what happened, and warned that if he failed to do so, they could lose custody of the child, as well as mother's older child. Kaiser testified that he did not cause the child's injuries, but he asked mother if he should say he fell with the child. Kaiser gave a statement to the detective that he fell while holding the child on August 27, 2014, and reenacted the fall on video.[4] On September 1, two days before the child died, Kaiser texted mother, saying "I'm sorry for falling with him. I didn't mean to hurt him."

After the child's death, Kaiser was charged with first-degree murder while committing child abuse with past pattern of child abuse, in violation of Minnesota Statutes section 609.185, subdivision a(5) (2014), and two counts of second-degree felony murder

[4] According to doctors, this fall appeared inconsistent with the child's injuries. Kaiser testified at trial that he did not, in fact, fall with the child but gave the statement in an attempt to avoid removal of the children from his and mother's custody.

without intent, in violation of Minnesota Statutes section 609.19, subdivision 2(1) (2014), with third-degree assault and malicious punishment of a child as the underlying felonies.

The case proceeded to a four-week jury trial. During the trial, many witnesses testified including Kaiser and mother, other family members, and mother's coworkers. But the majority of the testimony was given by medical experts. These experts included the child's treating physician from Children's Hospital; the child's treating surgeon; a radiologist; an eye doctor specializing in children and who examined the child's retinas; a pathologist; a forensic pathologist who specializes in neuropathology; a pediatric neurologist; two medical examiners; a doctor who specializes in child abuse; and a doctor who specializes in NEC.

The state's theory of the case was that Kaiser inflicted the child's injuries while the child was in his care. It was these injuries, namely the brain injury, which brought the child to the hospital in the first place and ultimately led to and caused the child's death. While the state presented many witnesses, a key medical expert witness was Dr. Hudson, a specialist in child abuse, who supported the state's theory by testifying that he believed the child was abused, that the child's injuries were inconsistent with the short fall Kaiser described, and that the NEC was a complication of the child's brain injury.

The defense's theory of the case was that while the brain injury brought the child to the hospital in the first place, the child contracted NEC while in the hospital due to doctors' use of the drug Propofol, and that it was the NEC that ultimately caused the child's death since the brain injury alone was survivable. The defense's key medical witness Dr. Leach, a specialist in NEC, supported the defense's theory by testifying that the use of Propofol

in infants is problematic because it can cause low blood pressure which is then a risk factor for NEC. The Propofol used here did cause the child's NEC, Dr. Leach testified, and the NEC caused the child's death.

The case went to the jury, and after deliberations, the jury acquitted Kaiser of first-degree murder, but found him guilty of both counts of second-degree felony murder. A *Blakely* trial followed, where the jury found six aggravating factors. The district court granted an upward durational departure and sentenced Kaiser to 240 months in prison.

Following sentencing, a juror contacted Kaiser's counsel to report concerns about the deliberations. The juror described problems with receiving dinner while sequestered at a hotel and feeling pressured to agree with the guilty verdicts on the second day because the jurors were afraid they may not be fed again. The district court denied Kaiser's motion for an evidentiary hearing to determine if the jury was compromised, explaining that "the stress of deliberations and sequestration, coupled with the problems in arranging for a late evening meal, are not indicative of misconduct." And the court considered the notion that food would be withheld from the jury not to be credible.

Kaiser appeals.[5]

[5] Kaiser appealed following the court's final judgement and sentencing, but the appeal was stayed to allow him to bring a motion to have a *Schwartz* hearing to determine if there was juror misconduct. The appeal proceeded after the district court ruled on the motion.

## D E C I S I O N

### I. The district court did not deprive Kaiser of his right to present a complete defense by excluding evidence of mother's drug use and of work in a previous case by a testifying medical examiner.

Kaiser argues the district court deprived him of his due process right to present a complete defense by not allowing him to question mother about her prior drug use and by not allowing for the introduction of extrinsic evidence during the cross-examination of a medical examiner.[6]

Every criminal defendant, under due process clause of the 14th Amendment of the United States Constitution, and under Article 1, section 7, of the Minnesota Constitution, must be "afforded a meaningful opportunity to present a complete defense." *State v. Richards*, 495 N.W.2d 187, 191 (Minn. 1992) (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984)). But a defendant still must "establish the relevance and admissibility of the evidence." *State v. Svoboda*, 331 N.W.2d 772, 775 (Minn. 1983). And the district court has the discretion to limit cross-examination to avoid "harassment, decision making on an improper basis, confusion of the issues," repetition, and testimony that is only marginally relevant. *State v. Lanz-Terry*, 535 N.W.2d 635, 639 (Minn. 1995).

Evidentiary rulings rest within the sound discretion of the district court and will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn.

[6]Kaiser also frames these evidentiary challenges as a denial of his right to confront witnesses under the Sixth Amendment of the United States Constitution, and Article 1, section 6, of the Minnesota Constitution. For the same reasons we determine that Kaiser was not denied his right to present a complete defense, we also conclude he was not denied the right to confront witnesses.

2003). On appeal, Kaiser has the burden to demonstrate the court abused its discretion and that he was thereby prejudiced. *Id.* And when an error implicates a constitutional right, an appellate court will award a new trial "unless the error is harmless beyond a reasonable doubt." *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012).

***Exclusion of evidence of mother's drug use***

Prior to trial, Kaiser made a motion to allow the defense to question mother about her prior drug use. Kaiser presented evidence that mother used marijuana while pregnant with the child and alleged that she snorted Vicodin within weeks of the child's birth and previously overdosed on Adderall. The district court denied the motion.

Kaiser argues he should have been able to question mother regarding her drug use for two reasons that were integral to the defense theory. First, he argues it was mother's drug use that led her to pressure Kaiser to tell the police he caused the child's injuries, in order to prevent child protection from looking into her background and possibly removing her children based on that drug use. Second, it would have allowed Kaiser to ask his medical expert about the possibility that mother's drug use during pregnancy caused the NEC which then, per the defense's theory of the case, caused the child's death.

The district court denied Kaiser's request to offer evidence of mother's drug use for two reasons. First, the court determined mother's drug use was irrelevant to Kaiser's assertion that he informed officers he fell with the child to prevent a child protection investigation. As the court noted, "child protection was [already] involved. And although they're interested in parents that have issues with chemicals, it would seem to me the

overriding interest of child protection in this case, is that they had a child with a significant brain injury in the hospital and they were going to be involved in any event."

Second, Kaiser did not adequately present an offer of proof demonstrating causation between the use of the type of drugs mother allegedly used—Vicodin, marijuana, and Adderall—and NEC. While Kaiser asserted that his expert witness, Dr. Leach, would testify that drug use could be a contributing factor to NEC, Kaiser also admitted he had nothing to offer the court that "directly links [mother's] drug use that is noted in the medical records to the NEC that took [child]'s life," and that his expert witness's "report specifically points to the use of propofol by the hospital as the agent that triggered the NEC."

The district court has wide discretion to determine what evidence is relevant. *State v. Schulz*, 691 N.W.2d 474, 477 (Minn. 2005). And a "trial court possesses wide latitude to impose reasonable limits on cross-examination of a prosecution witness" to prevent harassment, decision making on an improper basis, and testimony that is only marginally relevant. *Lanz-Terry*, 535 N.W.2d at 639. Here, the district court properly determined the evidence of mother's drug use was both not probative and, even if it was, that questions about it would harass mother.

Mother's drug use was not probative because the defense was able to question mother, who admitted to pressuring Kaiser to tell the police something in order to avoid a child-protection investigation. This allowed the defense to present its theory of the case. Additionally, mother's drug use was not probative to the NEC issue because Kaiser admitted his expert could not tie mother's drug use to the child's development of NEC.

And Kaiser's expert did testify that NEC was the cause of the child's death—just that it was the Propofol that caused the NEC, not mother's drug use.

And even if evidence of mother's drug use was marginally probative, the district court has the discretion to limit cross-examination to protect the witness from harassment. *Lanz-Terry*, 535 N.W.2d at 639. Questions regarding mother's drug use would have harassed her at a time when she already has to endure testifying about the death of her child.

Because the evidence of mother's drug use was not probative—the defense was able to present their theory of the case—and because even if the evidence was marginally probative the district court has the discretion to protect a witness from harassment, the district court did not abuse its discretion by suppressing it.

***Exclusion of evidence of previous testimony by the medical examiner***

During trial, the defense also asked the court to allow certain evidence to impeach Dr. McGee, the Ramsey County Medical Examiner, who planned to testify as to the child's cause of death, ruling it a homicide. The defense intended to use the outcome of a prior postconviction court decision, *Hansen v. State*, where Dr. McGee testified in a child-homicide case where an infant had a head injury. The conviction was later reversed in a postconviction proceeding because McGee's testimony was determined by the court to be false or incorrect. The defense argued this prior case was relevant because it led to a later

investigation into Dr. McGee's work and a recommendation from the Ramsey County Attorney's office that his work be reviewed by an independent professional.[7]

The district court allowed Kaiser to ask Dr. McGee about the *Hansen* case and whether he had ever falsely or incorrectly testified, but the state informed the court that it believed McGee would say no, since he continues to believe his testimony in *Hansen* was correct. The district court disallowed the use of any extrinsic evidence if that was his answer, citing Minnesota Rule of Evidence 608(b).

It is not unusual that a court would disallow extrinsic evidence[8] under these circumstances. Rule 608(b) provides that "[s]pecific instances of the conduct of the witness, for the purpose of attacking or supporting the witness' character for truthfulness . . . may not be proved by extrinsic evidence," and it is well established that an examining attorney who "inquires into collateral matters on cross-examination, including those matters relating to the witness' credibility, is bound by the answers he receives." *State v. Ferguson*, 581 N.W.2d 824, 834 (Minn. 1998) (quotation omitted). That cross-examiner is not permitted to introduce "collateral matters to prove facts contradicting the answers, even if they are false." *Id*. Here, the extrinsic evidence submitted regarding Dr. McGee's previous testimony would have been collateral and offered to challenge his credibility; therefore, the court's exclusion of extrinsic evidence was not an abuse of discretion.

[7] McGee told the state he was under no obligation to have his work reviewed at the time of Kaiser's trial.

[8] Extrinsic evidence is evidence adduced by means beyond that of cross-examination of the witness, including documents, recordings, or other witnesses' testimony. *Black's Law Dictionary* 675 (10th ed. 2014).

Kaiser argues that "a wide range of inquiry should be allowed on cross-examination of expert witnesses." *Murray v. Walter*, 269 N.W.2d 47, 49 (Minn. 1978). But the district court did not significantly limit Kaiser's inquiry. Kaiser was allowed to question Dr. McGee about *Hansen*, but chose not to—likely due to the fact that he would have probably denied wrongdoing—bringing us back to the extrinsic-evidence issue we addressed above. [9]

Additionally, even if the court's exclusion of extrinsic evidence was in error, that error was harmless beyond a reasonable doubt. The state called a staggering amount of medical experts to testify regarding the death of the child, including another medical examiner who confirmed Dr. McGee's findings. And while Kaiser argued that Dr. McGee was the witness "who most directly testified that the injuries were non-accidental," this is simply not the case. There were multiple other qualified medical experts who testified to the same or similar opinions including the state's central witness, Dr. Hudson, a child-abuse specialist, who examined the child while he was alive and in the hospital, and who also determined that the child was abused.

The district court did not abuse its discretion by disallowing the use of extrinsic evidence in questioning Dr. McGee.

[9] Kaiser also argues jurors should have seen extrinsic evidence—namely, the postconviction court's order—because it noted Dr. McGee "had only sporadically attended professional meetings, and had not made presentations or published articles in years." We note that Kaiser was in no way limited as to what he could ask Dr. McGee on cross-examination about professional meetings, presentations, or publications.

## II. There was no error in the jury instructions that included proximate and superseding cause.

The central issue in this case is causation, and the defense's theory of the case rested on the idea that it was the NEC, developing out of the administering of Propofol, and not the child's head injury, that caused the child's death. Because of multiple causation theories, the district court provided instructions to the jury on proximate and superseding cause. Kaiser argues these instructions were in error because they (1) misstated the law, (2) were likely to confuse the jury, and (3) improperly highlighted the state's evidence.

A district court has broad discretion to formulate appropriate jury instructions and only abuses its discretion if the jury instructions "confuse, mislead, or materially misstate the law." *Taylor*, 869 N.W.2d at 14-15 (quoting *State v. Kelley*, 855 N.W.2d 269, 274 (Minn. 2014)). It is this court's role to review whether the instructions, as a whole, fairly and adequately explain the law. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005).

First, Kaiser argues the district court misstated the law. An assessment of whether a jury instruction correctly states the law requires the consideration of statute and caselaw. *See State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (applying statute and caselaw to determine whether a jury instruction misstated the law). Second-degree felony murder is defined by statute as one who "causes the death of a human being, without intent to effect the death of any person, while committing or attempting to commit a felony offense." Minn. Stat. § 609.19, subd. 2(1). Cause, in a criminal context, requires only that the defendant's acts were a "substantial causal factor." *State v. Gatson*, 801 N.W.2d 134, 146 (Minn. 2011) (quoting *State v. Olson*, 435 N.W.2d 530, 534 (Minn. 1989)). The traditional

jury instruction, contained in the standard criminal jury instruction for second-degree felony murder, states for the causation element only that "the defendant caused the death of" the victim. 10 *Minnesota Practice*, CRIMJIG 11.29 (2015). Instead of giving this instruction, the district court added a modified version of the standard civil jury instructions to explain proximate and superseding cause, requiring that the defendant's conduct be:

> a proximate cause of [the child's] death. Proximate cause means that the defendant's conduct was a substantial factor in causing the death of [the child]. There may be more than one proximate cause of a death . . . . [H]owever, a cause is not a proximate cause when there is a superseding cause. A *superseding cause* is a cause which comes after the original conduct and which alters the natural sequence of events and produces a result which would not otherwise have occurred.

(Emphasis added.)

Kaiser asserts the district court misstated the law in its use and definition of superseding cause. But caselaw demonstrates that the civil definition of superseding cause can apply in a criminal context. In *State v. Hofer*, a criminal case, this court determined that an intervening cause becomes a superseding cause, limiting a defendant's liability, when (1) its harmful effects occur after the original negligence; (2) it was not brought about by the original negligence; (3) it actively worked to bring about a result which would not otherwise have followed from the original negligence; and (4) it was not reasonably foreseeable by the original wrongdoer. 614 N.W.2d 734, 737 (Minn. App. 2000), *review denied* (Minn. Aug. 15, 2000). This is similar to civil jury instruction on superseding cause and similar to the court's instruction. *See* 4 *Minnesota Practice*, CIVJIG 27.20 (2014).

But Kaiser asserts the court's actual instruction to the jury on superseding cause did not comport with this standard from *Hofer*, specifically the third element. The court used the language "alters the *natural sequence* of events and produces a result which would not otherwise have occurred" (emphasis added) instead of from *Hofer*, "it must have actively worked to bring about a result which would not otherwise have followed from the original negligence." *Hofer*, 614 N.W.2d at 737. Kaiser argues this "natural sequence" language is a material difference.

This is a distinction without a difference. As the state points out, the language the court used here has been used in criminal cases previous to *Hofer*, and that *Hofer* relies on, to define superseding cause. For instance, in *State v. Jaworsky*, the district court included in its instruction that a superseding cause "must turn aside the *natural sequence* of events and produce a result which would not otherwise have followed from the original negligence," an instruction almost identical to what the trial court stated here. 505 N.W.2d 638, 641 (Minn. App. 1993) (emphasis added), *review denied* (Minn. Sept. 30, 1993). And *Hofer* cited *Jaworsky* for its standard. *Hofer*, 614 N.W.2d at 737. This language difference is not material and did not misstate the law.[10]

[10] Kaiser also argues that the district court misstated the law because the instruction was incomplete since it did not include the last element from *Hofer*, that "it must not have been reasonably foreseeable by the original wrongdoer." 614 N.W.2d at 737. He argues that leaving off this last requirement benefitted the state because the jury could likely find that Kaiser could not have reasonably foreseen that the child would contract NEC while in the hospital and die. But because Kaiser would have to fulfill all four elements of *Hofer* to establish a superseding cause, and the jury, by coming to its verdict, already determined that he did not meet the first three, this too was immaterial.

Next, Kaiser argues the jury instructions confused the jury because it made the causation factor more complicated than necessary. Specifically, the district court changed the term "cause" to "proximate cause" and stated there could be multiple proximate causes. Because caselaw supports the fact that there can be multiple causes of death, the fact that the court stated that there could be multiple causes was not improper. *See, e.g.*, *Hofer*, 614 N.W.2d at 737, *Jaworsky*, 505 N.W.2d at 641. Additionally, "proximate cause" has been previously used in criminal cases. *See State v. Nelson*, 806 N.W.2d 558, 562 (Minn. App. 2011) (citing *Jaworsky*, 505 N.W.2d at 643), *review denied* (Minn. Feb. 14, 2012)).

Finally, Kaiser argues the instruction benefited the state because it was the state's witness, Dr. McGee, who testified that he was trained to look for "proximate case," defined proximate cause in his testimony, and stated the head injury was the proximate cause of the child's death. And jury instructions, generally, should not draw attention to any particular kinds of evidence. *State v. Starfield*, 481 N.W.2d 834, 839 (Minn. 1992).

But here again, we highlight the fact that Dr. McGee was one of a multitude of medical experts who testified. His testimony was only a small part of the medical testimony that spanned thousands of pages of transcript. While the state mentioned his testimony in its closing argument, it did so with little more than a passing reference in more than 70 pages of closing transcript. By contrast, much of the state's closing argument focused on Dr. Hudson's testimony, especially regarding the issue of causation and non-accidental trauma.

The district court did not abuse its discretion in its jury instructions by misstating the law, confusing the jury, or providing an instruction that improperly supported the state's case. Because there was no error, we do not engage in an analysis of any possible prejudice.

## III. The district court did not abuse its discretion by denying Kaiser's motion for a *Schwartz* hearing.

Kaiser argues he was entitled to what is referred to as a S*chwartz* hearing on potential juror misconduct because a juror came to his counsel concerned about the deliberations. As reported by that juror, while the jury was sequestered at a hotel following the first day of deliberations, the jury had not been provided dinner before 10:00 p.m. One of the jurors who worked at a nearby restaurant ultimately called that restaurant to get the jurors' dinner. According to the reporting juror, the following morning, based on fear that they would continue to be sequestered and not fed, that juror and a few others felt pressured to succumb to the majority to change their positions and vote guilty. Kaiser argues the call to the outside restaurant was improper, and the discussions surrounding food influenced the outcome of deliberations.

If there is evidence of jury misconduct the court may, in its discretion, order an evidentiary hearing. *Schwartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960). "The law guarantees that every defendant will have his case decided strictly according to the evidence presented and not by extraneous matters or by the predilections of individual jurors." *State v. Varner*, 643 N.W.2d 298, 304 (Minn. 2002). And a *Schwartz* hearing allows the defendant to question jurors under oath to determine whether jury misconduct occurred or any outside influence improperly affected the verdict.

*Schwartz*, 258 Minn. at 328, 104 N.W.2d at 303. The party requesting the hearing must establish a prima facie case of misconduct to obtain it. *State v. Anderson*, 379 N.W.2d 70, 80 (Minn. 1985); *State v. McBroom*, 394 N.W.2d 806, 812 (Minn. App. 1986), *review denied* (Minn. Jan. 16, 1987). This requires the requesting party to present evidence which "standing alone and unchallenged, would warrant the conclusion of jury misconduct." *State v. Starkey*, 516 N.W.2d 918, 928 (Minn. 1994) (quotation omitted). We review a district court's denial of a *Schwartz* hearing for abuse of discretion. *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998).

Here, the district court determined that Kaiser did not meet his burden to establish a prima facie case of juror misconduct. The court acknowledged the stress that comes along with sequestration, as well as the administrative challenge in getting the jury this particular dinner,[11] but determined this did not raise to the level of misconduct. And the district court deemed the notion that food would be withheld from the jury not to be a credible one. We agree.

While it appears that the juror who contacted Kaiser's counsel was uncomfortable with the ultimate outcome of the deliberations, we concur with the district court that contacting a restaurant to obtain food is not an action that would create an outside influence on the verdict. While we do not condone such a late dinner, and every effort should be made to avoid such a situation, the idea that the jury would continue not to be fed if they

[11] While not entirely clear from the record, it appears that there were administrative challenges getting food to the jurors at their hotel that evening.

continued deliberations is implausible. The district court did not abuse its discretion in denying Kaiser's motion for a *Schwartz* hearing.

**Affirmed.**