

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1317**

State of Minnesota,
Respondent,

vs.

Rogers Kenneth Davis,
Appellant.

**Filed August 14, 2023
Reversed and remanded
Johnson, Judge**

Beltrami County District Court
File No. 04-CR-22-559

Keith Ellison, Attorney General, St. Paul, Minnesota; and

David L. Hanson, Beltrami County Attorney, Michael V. Mahlen, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Gaïtas, Judge; and Florey, Judge.*

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

NONPRECEDENTIAL OPINION

JOHNSON, Judge

A Beltrami County jury found Rogers Kenneth Davis guilty of a controlled-substance crime based on evidence that he possessed methamphetamine. After the verdict, Davis moved for a *Schwartz* hearing and a new trial. The district court denied the motion. We conclude that the district court erred because Davis made a *prima facie* case of juror misconduct by showing that one juror failed to disclose a prior criminal conviction during *voir dire*. Therefore, we reverse and remand for a *Schwartz* hearing.

FACTS

In February 2022, Bemidji police officers received a report that a person was sleeping in the driver's seat of a parked vehicle outside a multi-unit apartment building. After Davis and his passengers were removed from the vehicle, officers found methamphetamine and drug paraphernalia in the vehicle.

In an amended complaint, the state charged Davis with first-degree controlled-substance crime, in violation of Minn. Stat. § 152.021, subd. 1(1) (2020), based on the allegation that he sold 17 or more grams of methamphetamine, and second-degree controlled-substance crime, in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2020), based on the allegation that he possessed 25 or more grams of methamphetamine.

The case was tried to a jury on two days in June 2022. During *voir dire*, the district court explained to potential jurors that the court and counsel would ask them questions, that they “must answer under oath,” and that their “contribution to this important and serious matter is best assured by” their “honest answers to those questions.” The district

court also explained that a potential juror could, on request, answer *voir dire* questions “outside the presence of other jurors” if the answer was sensitive or would have an adverse effect on other potential jurors.

The district court asked potential jurors numerous questions, including the following question: “Have you, a member of your family or anyone close to you ever been accused of a crime, other than a minor non-alcohol related traffic violation, like a parking ticket or a traffic ticket?” In response, several potential jurors raised their hands. The district court asked follow-up questions of each potential juror who raised a hand. One potential juror stated a preference for answering the question outside the presence of other potential jurors, which the district court allowed. Juror H did not raise his hand in response to the question about whether he had been accused of a crime. Juror H was seated on the jury.

The state called four witnesses. Davis did not testify and did not call any other witnesses. The jury found Davis guilty on both counts.

On the day of the sentencing hearing in July 2022, Davis filed a motion for a *Schwartz* hearing and a new trial. *See Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301 (Minn. 1960). He asserted three reasons why he is entitled to a new trial, all of which related to alleged misconduct by Juror H. Davis’s first asserted reason was that Juror H “lied or misled the court and counsel during *voir dire*.” At the sentencing hearing, the district court denied Davis’s request to continue sentencing, adjudicated Davis guilty on count 1, sentenced him to 102 months of imprisonment, and scheduled a subsequent hearing on Davis’s motion for a *Schwartz* hearing and a new trial.

At a hearing in August 2022, Davis introduced into evidence a document obtained from the Red Lake Nation Sex Offender registry, which states that Juror H was convicted in 1995 of “child sex abuse,” in violation of 18 U.S.C. § 2241(c) (1994). Davis argued that Juror H was untruthful during *voir dire* because he did not disclose his prior conviction in response to the district court’s question about whether potential jurors ever had been accused of a crime. At the conclusion of the hearing, the district court took the matter under advisement. The district court later filed a six-page order in which it denied Davis’s motion for a *Schwartz* hearing and, thus, his motion for a new trial. Davis appeals.

DECISION

Davis argues that the district court erred by denying his motion for a *Schwartz* hearing.

The supreme court recently summarized the applicable law as follows:

A *Schwartz* hearing provides a party an opportunity to impeach a verdict due to juror misconduct or bias. A verdict may be impeached by testimony establishing that a juror gave false answers during voir dire that concealed prejudice or bias toward one of the parties. *See* Minn. R. Crim. P. 26.03, subd. 20(6) (incorporating Minn. R. Evid. 606(b)). Although a *Schwartz* hearing should be liberally granted, *State v. Benedict*, 397 N.W.2d 337, 339 (Minn. 1986), a district court need not hold one unless the party seeking review first establishes a prima facie case of juror misconduct or bias. “To establish a prima facie case, a defendant must submit 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).

Pulczynski v. State, 972 N.W.2d 347, 361 (Minn. 2022). This court applies an abuse-of-discretion standard of review to a district court’s ruling on a motion for a *Schwartz* hearing. *Id.* at 361.

In this case, the district court discussed and rejected each of Davis’s three arguments for a *Schwartz* hearing. On appeal, Davis renews only the first argument that he presented to the district court: that Juror H engaged in misconduct by failing to disclose his prior conviction after being asked a question that required him to do so. The district court rejected that argument for four reasons, which we consider below in turn.

1.

The district court first reasoned that Davis did not establish a *prima facie* case because he did not provide a transcript of *voir dire*. It is unclear whether that is a sufficient reason to deny a motion for a *Schwartz* hearing. More than 50 years ago, the supreme court stated, “Nothing should prevent the trial court from ordering a *Schwartz* hearing on the grounds of an oral assertion by counsel or hearsay affidavit.” *Olberg v. Minneapolis Gas Co.*, 191 N.W.2d 418, 424 (Minn. 1971). The supreme court later urged district courts to require the presence of a court reporter at *voir dire* and recognized a defendant’s right to insist on a court reporter. *Benedict*, 397 N.W.2d at 340; *State v. Stofflet*, 281 N.W.2d 494, 498 (Minn. 1979).

In any event, Davis has provided this court with a transcript of *voir dire*. The state has not objected to its inclusion in the appellate record on the ground that it was not presented to the district court with the motion. Also, the state does not argue that a *prima facie* case is lacking because of the absence of a transcript, perhaps because the relevant

question was posed by the district court. In addition, the state cites *Olberg* for the proposition that juror misconduct may be established without a transcript. Accordingly, we will refer to the transcript in considering Davis's arguments.

2.

The district court characterized Davis's first argument as an argument "that Juror H was silent on his involvement with law enforcement in the past." Davis argued to the district court that, by not responding to the district court's question as to whether any potential juror had ever been accused of a crime, Juror H lied to the district court and was deceptive about his criminal record. The district court did not make any finding as to whether Davis was untruthful in *voir dire*.

The applicable caselaw is clear that an untruthful response in *voir dire* is a form of juror misconduct that could warrant a *Schwartz* hearing. The supreme court has recognized the long-standing common-law rule that a verdict may be impeached if there is "some indication that a juror gave false answers on voir dire which concealed prejudice or bias toward one of the parties and thereby deprived that party of a fair trial." *Stofflet*, 281 N.W.2d at 498 (quoting Note, 4 Wm. Mitchell L. Rev. 417, 432 (1978)). The supreme court applied this standard in *Benedict* but rejected the appellant's argument on the ground that "defense counsel did not ask the sort of clear question that . . . necessarily would have elicited the disclosure of the sort of information that the foreman withheld" such that appellant "failed to make a sufficient showing that the juror in question lied." 397 N.W.2d at 340. Similarly, in *Pulczynski*, defense counsel "never asked Juror #8 on voir dire any questions that would have elicited" the information that was withheld, which caused the

supreme court to conclude that the appellant “failed to produce evidence that standing alone and unchallenged, would warrant a conclusion that Juror #8 answered questions falsely during voir dire.” 972 N.W.2d at 361.

In this case, however, the question posed to potential jurors was clear. The district court asked: “Have you . . . ever been accused of a crime, other than a minor non-alcohol related traffic violation, like a parking ticket or a traffic ticket?” Several other potential jurors raised their hands, including one potential juror who wanted to answer the question outside the presence of other potential jurors, which the district court allowed. Given the evidence of Juror H’s prior conviction, Juror H was obligated to raise his hand. Juror H’s failure to raise his hand in response to the district court’s question is sufficient evidence to “warrant a conclusion that [Juror H] answered questions falsely during voir dire.” *Id.*

3.

The district court also reasoned that Davis “fail[ed] to show how [Juror H’s] answers constitute actual misconduct that resulted in prejudice to him.” Davis argues that he is not required to establish prejudice as part of his *prima facie* case. He asserts, “All that is required for a *Schwartz* hearing to be granted is a *prima facie* case of jury misconduct.” Davis cites caselaw in which the supreme court has affirmed the denial of a *Schwartz* hearing based solely on the absence of juror misconduct. *See State v. Martin*, 614 N.W.2d 214, 225-26 (Minn. 2000); *State v. Church*, 577 N.W.2d 715, 721 (Minn. 1998); *Larson*, 281 N.W.2d at 484. In response, the state argues that, in ruling on a motion for a *Schwartz* hearing, a district court may consider the likelihood of prejudice based on facts in the record. The state cites *Stofflet*, in which the appellant sought a *Schwartz* hearing “to

examine a juror about her possible bias toward defense counsel because of a prior feud over defense counsel's management of an amateur hockey club." 281 N.W.2d at 498. The supreme court affirmed the district court's denial of a *Schwartz* hearing for several reasons, including its view that "it is questionable whether a juror would penalize a defendant simply because of a bad prior experience with defense counsel." *Id.* at 498-99.

This case is similar to *Benedict* and *Pulczynski* in that the alleged misconduct is an untruthful statement during *voir dire*. In those two opinions, the supreme court did not consider whether the appellant had made a showing of prejudice when seeking a *Schwartz* hearing. *See Pulczynski*, 972 N.W.2d at 361; *Benedict*, 397 N.W.2d at 340. The supreme court's reasoning in those opinions indicates that, if the alleged misconduct is untruthfulness in *voir dire*, a party seeking a *Schwartz* hearing is not required to make a showing of prejudice in order to obtain a *Schwartz* hearing. The absence of such a requirement is logical because it usually would be difficult to infer a reason why a potential juror did not provide information that he or she was obligated to provide. The purpose of a *Schwartz* hearing is to allow a party to impeach a verdict "by testimony establishing that a juror gave false answers during voir dire that concealed prejudice or bias toward one of the parties." *Pulczynski*, 972 N.W.2d at 361. Davis and his attorney were not allowed to contact Juror H in any way other than a *Schwartz* hearing. *See Baker v. Gile*, 257 N.W.2d 376, 377-78 (Minn. 1977); *Olberg*, 191 N.W.2d at 424; *Schwartz*, 104 N.W.2d at 303. Accordingly, in light of the type of juror misconduct alleged, Davis was not required to make a showing of prejudice in order to obtain a *Schwartz* hearing.

4.

The district court concluded its analysis of Davis’s first argument by reasoning that Davis “had the opportunity to move to strike Juror H as a juror for cause, or to strike him at the conclusion of *voir dire* if he truly believed that Juror H’s answers would result in the juror not being fair and impartial to him.” Davis argues that Juror H’s untruthful response to the district court’s question about his criminal history prevented him from questioning Juror H about that issue and, thus, potentially denied him information that he might have used to remove Juror H from the venire.

A criminal defendant may remove a potential juror for cause on the ground that the potential juror was dishonest in *voir dire* if the party can establish that the potential juror “cannot try the case impartially and without prejudice to the substantial rights of the challenging party.” Minn. R. Crim. P. 26.02, subd. 5(1)1; *see also State v. McKinley*, 891 N.W.2d 64, 67-69 (Minn. App. 2017) (affirming district court’s for-cause removal of potential juror who was untruthful in responding to juror questionnaire about his criminal history), *rev. denied* (Minn. Apr. 26, 2017). A criminal defendant also may remove multiple potential jurors for any reason by exercising peremptory challenges. Minn. R. Crim. P. 26.02, subd. 6. Juror H’s untruthfulness during *voir dire* denied Davis information about Juror H’s criminal history, which might have adversely affected his attorney’s strategy in matters of jury selection. A *Schwartz* hearing would give Davis an opportunity to develop the record and possibly show that he was prejudiced by Juror H’s untruthfulness and by his service on the jury.

In sum, the district court did not articulate a valid reason for rejecting Davis’s first argument for a *Schwartz* hearing. The record before this court indicates that Juror H was untruthful during *voir dire*. Juror H’s untruthfulness may have prejudiced Davis. Thus, the district court erred by denying Davis’s motion for a *Schwartz* hearing. Therefore, we reverse and remand to the district court for a *Schwartz* hearing at which Davis may introduce evidence relevant to whether Juror H “gave false answers during voir dire that concealed prejudice or bias toward one of the parties.” *See Pulczynski*, 972 N.W.2d at 361; *see also Benedict*, 397 N.W.2d at 340 n.1 (stating that proper remedy is *Schwartz* hearing, not new trial); Minn. R. Evid. 606(b) (permitting limited inquiry into validity of verdict).

Reversed and remanded.