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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1377**

State of Minnesota,
Respondent,

vs.

Ben Vidal Moreno,
Appellant.

**Filed March 16, 2026
Affirmed
Kirk, Judge***

Freeborn County District Court
File No. 24-CR-22-1335

Keith Ellison, Attorney General, Timothy C. Rank, Assistant Attorney General, St. Paul, Minnesota; and

David Walker, Freeborn County Attorney, Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Patrick Monnens, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Cochran, Judge; and Kirk,
Judge.

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

NONPRECEDENTIAL OPINION

KIRK, Judge

In this appeal from convictions of second-degree murder, attempted second-degree murder, and unauthorized firearm possession, appellant argues that the district court plainly erred by instructing the jury that he had a duty to retreat and the prosecutor engaged in plain-error prosecutorial misconduct during closing argument. Appellant additionally challenges the district court's denial of his petition for postconviction relief in which he requested a hearing to investigate juror misconduct. Because the district court did not plainly err in its jury instruction, the prosecutor did not engage in plain-error misconduct, and the district court acted within its discretion by denying appellant's postconviction petition, we affirm.

FACTS

The following facts are drawn from information presented at appellant Ben Vidal Moreno's jury trial. In August 2022, Moreno and his girlfriend, R.V., were present at the farmstead where A.S. resided, along with A.S.'s girlfriend, A.E. R.V. and A.E. briefly left the farmstead. At some point, Moreno and A.S. entered a house on the property. During this time, J.V., the father of R.V., arrived at the farmstead in a vehicle with M.P. Moreno and J.V. were engaged in an ongoing dispute.

J.V. apparently noticed that Moreno was likely at the house after seeing Moreno's dog outside the house and he began yelling at Moreno to come outside. Moreno armed himself with a shotgun. J.V. fired two gunshots in the air and eventually left with M.P. R.V. and A.E. returned after J.V. left.

J.V. and M.P. later returned to the farmstead. J.V. got out of the vehicle and began arguing with his daughter, R.V. J.V. got back into the vehicle and M.P. began to drive the vehicle away. As they were leaving the farmstead, Moreno fired four shots from the shotgun at the back of the vehicle. At trial Moreno contended that J.V. fired a shot at him before he began shooting. Moreno, having exhausted the ammunition in the shotgun, went to the house and grabbed a rifle from A.S. M.P. began to speed away but stopped his vehicle after J.V. told him to do so. J.V. got out of the vehicle and began walking toward the house. Moreno encountered J.V. and shot him in the chest with the rifle.

Moreno fled with R.V. and A.E. after allegedly forcing them to leave with him at gunpoint. A.S. called 9-1-1 and began attempting lifesaving measures on J.V. In the process, he removed a pistol from J.V.'s pocket. J.V. died from his injuries, and Moreno was arrested in Iowa.

Respondent State of Minnesota charged Moreno by amended complaint with one count of second-degree intentional murder for the death of J.V. in violation of Minn. Stat. § 609.19, subd. 1(1) (2022), one count of second-degree unintentional murder while committing a felony for the death of J.V. in violation of Minn. Stat. § 609.19, subd. 2(1) (2022), one count of attempted second-degree murder related to M.P. in violation of Minn. Stat. § 609.19, subd. 1(1), and two counts of ineligible possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2) (2022).

In March 2024, the district court held a jury trial at which Moreno testified. Prior to closing argument, the district court instructed the jury, without objection, that to prevail on a self-defense claim Moreno had a duty to retreat or avoid danger if reasonably possible.

The jury found Moreno guilty of all counts. At the sentencing hearing, counsel for Moreno informed the district court about potential juror misconduct stemming from an allegation that a juror discussed the case with her husband during the trial. Noting that Moreno did not file a motion for a *Schwartz* hearing, the district court declined to reschedule the sentencing hearing but indicated that Moreno could still pursue the misconduct issue in postconviction proceedings.¹ The district court convicted Moreno of all counts except for the second-degree unintentional murder offense because it was a lesser-included offense of the second-degree intentional murder offense. The district court sentenced Moreno to 306 months in prison on the second-degree intentional murder offense and 173 months on the attempted second-degree murder offense, to be served consecutively. The district court sentenced Moreno on only one of the firearm-possession counts, imposing a 60-month sentence to be served concurrently with the other two sentences.

After Moreno filed a notice of appeal, this court granted his motion to stay the appeal to pursue postconviction proceedings. In April 2025, Moreno filed a postconviction petition requesting a *Schwartz* hearing to investigate purported juror misconduct or, in the alternative, an evidentiary hearing on the petition. He based his petition on a statement from an individual, H.C., who allegedly worked with the husband of one of the jurors on

¹ The term “*Schwartz* hearing” takes its name from *Schwartz v. Minneapolis Suburban Bus Co.*, 104 N.W.2d 301, 303 (Minn. 1960). A *Schwartz* hearing gives “a party an opportunity to impeach a verdict due to juror misconduct or bias.” *State v. Chauvin*, 989 N.W.2d 1, 22 (Minn. 2023) (quotation omitted), *rev. denied* (Minn. July 18, 2023).

his case. The husband allegedly told H.C. that Moreno was guilty. The district court determined that Moreno failed to establish a prima facie case of juror misconduct to warrant a *Schwartz* hearing and denied Moreno's postconviction petition. This court dissolved the stay of this appeal.

DECISION

I. The district court did not plainly err by instructing the jury that Moreno had a duty to retreat.

Moreno argues that the district court plainly erred by instructing the jury that he had a duty to retreat. Although appellate courts typically review jury instructions for an abuse of discretion, *State v. Baker*, 13 N.W.3d 401, 408 (Minn. 2024), a plain-error analysis applies here because Moreno failed to object to the jury instructions, *State v. Watkins*, 840 N.W.2d 21, 27-28 (Minn. 2013). Under plain-error review, Moreno must “establish (1) an error, (2) that is plain, and (3) that affects [his] substantial rights.” *Id.* at 28. “An error is plain if it is clear or obvious; usually this means an error that violates or contradicts case law, a rule, or an applicable standard of conduct.” *State v. Bustos*, 861 N.W.2d 655, 660-61 (Minn. 2015) (quotation omitted). “An error affects a defendant’s substantial rights if the error was prejudicial and affected the outcome of the case.” *Watkins*, 840 N.W.2d at 28. An error in jury instructions “is prejudicial if there is a reasonable likelihood that giving the instruction in question had a significant effect on the jury’s verdict.” *Id.* (quotation omitted). If a defendant establishes these first three prongs, appellate courts then evaluate “whether reversal is required to ensure the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* (quotation omitted).

The challenged jury instruction relates to Moreno's defense that he used force against J.V. while acting in self-defense. An individual may use "reasonable force" upon another "when used by any person in resisting . . . an offense against the person." Minn. Stat. § 609.06, subd. 1(3) (2022). Self-defense includes as elements:

- (1) The absence of aggression or provocation on the part of the defendant;
- (2) the defendant's actual and honest belief that he or she was in imminent danger of death or great bodily harm;
- (3) the existence of reasonable grounds for that belief; and
- (4) the absence of a reasonable possibility of retreat to avoid the danger.

Baker, 13 N.W.3d at 409 (quotation omitted). A person may not use force beyond what is reasonably necessary under the circumstances. *Id.*

At issue in this case is the fourth element: the duty to retreat. Although a person ordinarily has a duty to retreat if reasonably possible, the castle doctrine provides that "a person need not retreat from his or her home before acting in self-defense." *State v. Devens*, 852 N.W.2d 255, 258 (Minn. 2014).

Moreno maintains that the castle doctrine extends to situations during which a person is outside his or her residence but encounters someone who may do them harm. He adds that he was an invited guest and has standing to claim the protection of the castle doctrine. Moreno relies on *State v. Gardner*, 104 N.W. 971, 973-74 (Minn. 1905), in arguing that there is no duty to retreat when someone is outside his or her residence but encounters a person who poses a risk of harm. He points to the following language from *Gardner*, which quotes a United States Supreme Court decision:

The defendant was where he had a right to be when the deceased advanced upon him in a threatening manner and with a deadly weapon; and if the accused did not provoke the assault, and had at the time reasonable grounds to believe, and in good faith believed, that the deceased intended to take his life or do him great bodily harm, he was not obliged to retreat.

Gardner, 104 N.W. at 974 (quoting *Beard v. United States*, 158 U.S. 550, 564 (1895)).

The law has evolved since *Gardner* was decided over 100 years ago.

Assuming without deciding that Moreno can invoke the castle doctrine as an invited guest despite not living at a residence, cases subsequent to *Gardner* have clarified the limited scope of the castle doctrine. In *Devens*, the Minnesota Supreme Court explained that “the castle doctrine extends to a house, an apartment or part of a structure *where [the] defendant lives* and where others are ordinarily excluded.” 852 N.W.2d at 259 (emphasis added) (quotation omitted). Applying this rationale, the supreme court declined to extend the castle doctrine to an apartment hallway. *Id.* Our nonprecedential decision in *State v. Mayo* adopts a consistent holding in declining to extend the castle doctrine to the defendant’s front yard. No. A15-0511, 2016 WL 952501, at *4-6 (Minn. Mar. 14, 2016), *rev. denied* (Minn. May 31, 2016).²

Here, the shooting began on or near the driveway of the property and J.V. was killed while in the grass surrounding the property—far from a “part of a structure” where an individual lives and “where others are ordinarily excluded.” *Devens*, 852 N.W.2d at 259. Additionally, Moreno notes that he was present in the yard when the shooting occurred.

² We cite this decision only for its persuasive value. See Minn. R. Civ. App. P. 136.01, subd. 1(c).

Because Minnesota caselaw has not applied the castle doctrine to circumstances similar to those described here, we cannot say that the district court plainly erred by instructing the jury that Moreno had a duty to retreat.

II. The prosecutor did not engage in plain-error prosecutorial misconduct.

Moreno next argues that the prosecutor engaged in prosecutorial misconduct during closing argument and this misconduct violated his substantial rights. Because Moreno did not object to the alleged prosecutorial misconduct at trial, this court applies the modified plain-error test. *State v. Portillo*, 998 N.W.2d 242, 248 (Minn. 2023). Under this test, Moreno “has the burden to demonstrate that the misconduct constitutes (1) error, (2) that was plain.” *Id.* (quotation omitted). If Moreno meets his burden, “the burden then shifts to the State to demonstrate that the error did not affect [his] substantial rights.” *Id.* (quotation omitted). “If these three prongs are satisfied, the court then assesses whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings.” *Id.* (quotation omitted).

Moreno contends that the prosecutor engaged in prosecutorial misconduct during closing argument by: (1) attacking his character, (2) claiming that witnesses were afraid to testify, (3) improperly commenting on the presumption of innocence, and (4) accusing him of tailoring his testimony. We address each argument in turn.

A. Attack on Character

Moreno argues that the prosecutor, in challenging his credibility, improperly attacked his character during closing argument by stating that “he will lie to people to get what he wants.” The supreme court has explained that “[a]n advocate may indeed point to

circumstances which cast doubt on a witness's veracity or which corroborates his or her testimony, but he may not throw onto the scales of credibility the weight of his own personal opinion.” *State v. Ture*, 353 N.W.2d 502, 516 (Minn. 1984). Additionally, improper attacks on a defendant's character can constitute prosecutorial misconduct, such as a description of a defendant as a ““would-be-punk[]’ with a ‘pathetic little li[fe].”” *State v. Ives*, 568 N.W.2d 710, 713, 715 (Minn. 1997). Nevertheless, “[a] prosecutor's closing argument need not be colorless, so long as it is based on the evidence or reasonable inferences from that evidence.” *State v. Jones*, 753 N.W.2d 677, 691-92 (Minn. 2008).

We conclude that the prosecutor did not improperly attack Moreno's character. During cross-examination, the prosecutor asked Moreno, “In fact, you lie on a regular basis to people, depending on what you want to get from them; isn't that true?” Moreno responded, “Yes,” to the question. Because the prosecutor's statement during closing argument is reasonably based on Moreno's testimony, it does not constitute plain-error prosecutorial misconduct. *See id.*

B. Contention that Witnesses Were Afraid to Testify

Moreno next argues that the prosecutor improperly claimed that witnesses were afraid to testify. He appears to rely on the following statement from closing argument:

And some of the witnesses had divided loyalties: Some were friends with [Moreno]; some were friends with [J.V.]; some were in relationship with either one of them; and some were friends with both. *Some were scared about getting involved*; some were involved in other criminal matters; some had and some still do have chemical dependency issues; and some just did not want to talk to law enforcement.

(Emphasis added.) Moreno contends that, by making this statement, the prosecutor misstated the evidence by referring to facts not in evidence by suggesting that witnesses were afraid to testify due to their fear of him.

“It is misconduct for a prosecutor to intentionally misstate evidence or to appeal to the passions of the jury.” *State v. McArthur*, 730 N.W.2d 44, 53 (Minn. 2007). Likewise, “a prosecutor should not refer to facts not in evidence or vouch for the veracity of any particular evidence.” *Id.*

We conclude that the statement does not constitute plain-error prosecutorial misconduct. As an initial point, the challenged statement does not go so far as to say that witnesses were afraid to get involved due to their fear of Moreno. Indeed, the trial testimony supports the prosecutor’s statement that witnesses were afraid to get involved. Notably, the Freeborn County Sheriff testified that it is common to reinterview people during an investigation because “sometimes people are just scared to talk to you, and so they are not forthcoming right away, but after they have had some time to process it, they will give you more information.” A different witness, A.E., testified that she did not call 9-1-1 because “[s]he was scared,” adding that “[e]verything just happened; so much going on.” And A.S. testified that he was “nervous” before being interviewed by police. Therefore, because the prosecutor’s statement that certain witnesses “were scared about getting involved” is not an inaccurate interpretation of the testimony, it does not constitute plain-error prosecutorial misconduct, especially when considering Moreno’s burden of showing that this error is plain.

C. Presumption of Innocence

Moreno further argues that the prosecutor improperly commented on the presumption of innocence. He appears to point to two comments made by the prosecutor during closing argument. First, the prosecutor stated, “The evidence presented proves [Moreno’s] guilt beyond a reasonable doubt. The presumption of innocence has been overcome here, and the evidence that’s been presented to you throughout the course of this trial is the type of evidence to overcome that presumption.” The prosecutor later said, “we have overcome the presumption of innocence and [proven] [Moreno’s] guilt beyond a reasonable doubt.”

“It is axiomatic that criminal defendants are presumed innocent until proven guilty beyond a reasonable doubt.” *Portillo*, 998 N.W.2d at 248-49. Accordingly, an improper comment on the presumption of innocence can constitute prosecutorial misconduct. *See id.* at 249-50. In *Portillo*, the prosecutor stated that the presumption of innocence “leaves [a defendant] when the state has proven its case beyond a reasonable doubt,” adding that the defendant “no longer has the presumption of innocence” and “[h]e has been proven guilty beyond a reasonable doubt.” *Id.* at 246-47. The supreme court concluded that the comments constituted plain-error prosecutorial misconduct because of the “clear assertion by the prosecutor that the jury was ‘to talk and consider each other’s thoughts and the information you heard throughout the course of the case’ without affording Portillo the presumption of innocence because ‘he no longer has that presumption.’” *Id.* at 251.

The supreme court came to the opposite conclusion when addressing similar comments in *State v. Young*, 710 N.W.2d 272 (Minn. 2006). In *Young*, the prosecutor stated:

When the trial began, the Court told you that that young man right there is an innocent man. He was. Until the defense stood up and rested. Because at that time the state had presented to you sufficient evidence to find the defendant guilty of all the crimes that the Court just gave you the . . . instructions on. He's no long [sic] an innocent man. The evidence that's been presented to you by the state has shown you that he's guilty beyond a reasonable doubt.

Young, 710 N.W.2d at 280. These statements did not constitute prosecutorial misconduct because, when “[r]ead in context, . . . the prosecutor’s argument appears to be that the state had produced sufficient evidence of Young’s guilt to overcome the presumption of innocence, not that he was not entitled to the presumption in the absence of proof beyond a reasonable doubt.” *Id.* at 280-81. In *State v. Vue*, 797 N.W.2d 5, 13-14 (Minn. 2011), the supreme court addressed the following comments made by the prosecutor:

[B]ased upon the testimony that we have heard and the evidence that we have seen, our reason and common sense tell us that Gary Vue committed the crimes that he is accused of, the First and Second Degree Drive-By Shooting Murder of Za Xiong Committed for Benefit of a Gang. That is clear beyond a reasonable doubt. Therefore, the Defendant has lost his presumption of innocence.

Relying on *Young*, and without deciding whether the prosecutor’s statements constituted misconduct, the supreme court concluded that any misconduct “was not plain or obvious” under a plain-error review. *Id.* at 14.

Here, the prosecutor's statements are more like those in *Young* and *Vue* than *Portillo*. The prosecutor stated that "[t]he evidence presented proves the defendant's guilt beyond a reasonable doubt. The presumption of innocence has been overcome here, and the evidence that's been presented to you throughout the course of this trial is the type of evidence to overcome that presumption." Similarly, the prosecutor in *Vue* commented that the evidence proved the defendant's guilt beyond a reasonable doubt and that, as a result, the defendant "has lost his presumption of innocence." The prosecutor's statement in the present appeal that the "presumption of innocence has been overcome" demonstrates the belief that the state has produced sufficient evidence to overcome the presumption, a meaning distinct from the language in *Portillo* that the presumption of innocence "leaves [a defendant] when the state has proven its case beyond a reasonable doubt." 998 N.W.2d at 246-47. Accordingly, the prosecutor's statement about Moreno's presumption of innocence does not constitute plain-error prosecutorial misconduct.

D. Tailoring

With regard to prosecutorial misconduct, Moreno last argues that the prosecutor impermissibly accused him of tailoring his testimony. He relies on the prosecutor's following statement during closing argument:

Now, what the defendant told people on recorded phone calls is just him telling different stories to different people. His claim about trying to sound cool is a lie that he is telling you. *The defendant's testimony comes after he's had a chance to listen to everything and tailor a story that matches some aspects of the evidence but then using it to benefit himself.* And, unfortunately, his version of events does not match the physical evidence or other witnesses' testimony.

(Emphasis added.)

Through the Sixth Amendment's Confrontation Clause and the Fourteenth Amendment's Due Process Clause, the United States Constitution gives Moreno the right to be present at trial and listen to the testimony presented against him. U.S. Const. amends. VI, XIV; *State v. Swanson*, 707 N.W.2d 645, 657 (Minn. 2006). It is prosecutorial misconduct for a prosecutor to use "a defendant's exercise of his right of confrontation to impeach the credibility of his testimony . . . in the absence of evidence that the defendant has tailored his testimony to fit the state's case." *Swanson*, 707 N.W.2d at 657-58. But when there is evidence of tailoring, a prosecutor is free to impeach a defendant on those grounds. *State v. Leutschafft*, 759 N.W.2d 414, 419 (Minn. App. 2009), *rev. denied* (Minn. Mar. 17, 2009).

Tailoring of testimony "occurs when a witness shapes his testimony to fit the testimony of another witness or to the opponent's version of the case." *Id.* Helpful in defining the permissible scope of a tailoring argument is our decision in *State v. Ferguson*, 729 N.W.2d 604 (Minn. App. 2007), *rev. denied* (Minn. June 19, 2007). In *Ferguson*, we explained that:

Ferguson's account of the events changed significantly as the investigation progressed. Initially, Ferguson denied seeing the victim on the day of the shooting. After obtaining discovery and learning about the state's evidence, Ferguson's story changed significantly. The prosecutor thus had evidence of tailoring and could legitimately point out changes in Ferguson's story.

729 N.W.2d at 617.

In arguing that Moreno tailored his testimony, the prosecutor points to Moreno's testimony that he lied on a jail call about not seeing J.V. with a gun because, "[h]onestly, I don't know if I was just trying to seem cool to whoever I was talking to." This statement relates to a jail call that the state submitted as evidence in which Moreno, purportedly referring to the latter of J.V.'s two visits to the property, stated, "I didn't even know that [J.V.] had a gun on him, I guess that he had a gun on him."

Moreno argues that, although the prosecutor could likely argue that Moreno's contention that J.V. shot at him was not credible, the prosecutor went too far by stating that he tailored his testimony because he exercised his right to be present at trial.

We conclude that there is sufficient evidence of tailoring to justify the prosecutor's impeachment of Moreno on those grounds. Notably, the jail call demonstrates that Moreno initially acknowledged that he did not know that J.V. had a gun. Moreno then changed his story at trial, testifying that J.V. "shot at [him]." Like in *Ferguson*, Moreno's story changed significantly over the course of the investigation in which he argued that J.V. had a gun and shot at him, in contrast to his previous statement that he did not know that J.V. had a gun on him. Therefore, there is sufficient evidence of tailoring to support the prosecutor's accusation, meaning that the prosecutor did not engage in plain-error prosecutorial misconduct by accusing Moreno of tailoring his testimony.

III. The district court acted within its discretion by denying Moreno’s petition for postconviction relief.

Moreno argues that the district court abused its discretion by denying his petition for postconviction relief. In doing so, he contends that he established a prima facie case of juror misconduct based on the allegations that a juror engaged in improper communication while serving on the jury and predetermined the verdict. He adds that the district court improperly weighed evidence and erred by determining that the petition was untimely.

Appellate courts “review the summary denial of a petition for postconviction relief for an abuse of discretion.” *El-Shabazz v. State*, 984 N.W.2d 569, 573 (Minn. 2023). An abuse of discretion occurs when a district court “exercise[s] its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Id.* (quotation omitted).

Moreno, as the petitioner, bears the burden of showing facts entitling him to relief. *Allwine v. State*, 994 N.W.2d 528, 541 (Minn. 2023). “A district court need not hold an evidentiary hearing if the alleged facts when viewed in a light most favorable to the petitioner, together with the arguments of the parties, conclusively show that the petitioner is entitled to no relief.” *El-Shabazz*, 984 N.W.2d at 573 (quotation omitted); *accord* Minn. Stat. § 590.04, subd. 1 (2024) (requiring district courts to hold a hearing on a postconviction petition “[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief”). Allegations underlying a petition for postconviction relief “must be more than just . . . argumentative assertion[s].” *Doppler v. State*, 771 N.W.2d 867, 873 n.2 (Minn. 2009).

At issue is the district court's summary denial of Moreno's postconviction petition on the basis that he failed to demonstrate that he is entitled to a *Schwartz* hearing. As stated above, a *Schwartz* hearing gives "a party an opportunity to impeach a verdict due to juror misconduct or bias." *Chauvin*, 989 N.W.2d at 22 (quotation omitted). "To obtain a *Schwartz* hearing, a defendant must establish a prima facie case of jury misconduct by submitting sufficient evidence which, standing alone and unchallenged, would warrant the conclusion of jury misconduct." *Id.* (quotation omitted).

A district court may only consider evidence admissible under Minnesota Rule of Evidence 606(b) at a *Schwartz* hearing. See Minn. R. Crim. P. 26.03, subd. 20(6); *State v. Martin*, 614 N.W.2d 214, 226 (Minn. 2000). At a *Schwartz* hearing, a juror may not testify about statements made during deliberations or what influenced that or another juror to reach a certain verdict. Minn. R. Evid. 606(b). Under this rule, however, jurors may testify about whether any "outside influence was improperly brought to bear upon any juror, or as to any threats of violence or violent acts brought to bear on jurors . . . to reach a verdict, or as to whether a juror gave false answers on voir dire that concealed prejudice or bias toward one of the parties." *Id.*

Moreno sought a *Schwartz* hearing on the basis that one of the jurors disregarded the district court's instructions to not discuss the trial, demonstrated bias, and disregarded the presumption of innocence. In support of the postconviction petition, Moreno attached a summary of a telephone interview with H.C. According to Moreno, H.C. worked with Z, who is married to one of the jurors in Moreno's trial. H.C. said that "[Z] stated that the guy is guilty and did what he was accused of." H.C. indicated that "she thinks that [Z] said

this because his wife was telling him about the trial but she doesn't know for sure." H.C. additionally stated that Z's wife "was the juror that was sobbing and that's another reason why she thinks [Z's wife] was telling Z about the trial because she was having a tough time handling it." However, H.C. does not remember the name of the juror or Z's last name.

In denying the petition for postconviction relief, the district court stated that "because H.C. cannot identify which female juror engaged in improper external communication, it is unclear whether a sitting juror engaged in misconduct that could have potentially affected or influenced the jury's deliberations." The district court added that "H.C. does not claim that the unidentified female juror expressed to [Z] that *the female juror* believed Petitioner was guilty and did what he was accused of. Rather, it was [Z's] statement that 'the guy is guilty and did what he was accused of.'"

Moreno first argues that the interview demonstrates a prima facie case that the juror engaged in improper communication while the matter was pending. However, as the district court noted, H.C.'s statement does not include an allegation that the juror communicated with Z about the case. Rather, H.C. only stated that Z believed that Moreno was guilty, and H.C. merely speculated that "[Z] said this because his wife was telling him about the trial but she doesn't know for sure." Although, at this juncture, the district court is required to view the allegations in the light most favorable to Moreno, *Allwine*, 994 N.W.2d at 541, absent in H.C.'s statement is any allegation that Z communicated to his wife that Moreno was guilty. Therefore, Moreno fails to demonstrate a prima facie case of juror misconduct on this basis.

Moreno likewise argues that H.C.'s statement demonstrates that the juror disregarded the presumption of innocence, indicating that the juror gave a false statement during voir dire that concealed bias or prejudice. Again, absent in H.C.'s statement is any allegation beyond speculation that the juror prejudged the evidence and accordingly was dishonest during voir dire. H.C. merely indicated Z's belief about guilt did not include any allegation that the juror spoke with Z about the case or indicated that she did not believe that Moreno was presumed innocent. Critically, H.C. stated that "she [didn't] know for sure" whether the juror discussed the trial with Z. Moreno similarly fails to establish a prima facie case of juror misconduct on this basis.³

Affirmed.

³ Moreno adds that the district court made improper credibility determinations in denying the petition. He points to the district court's statement in which it dispelled H.C.'s allegation that a juror was crying during the trial. However, even assuming that the district court acted improperly by making credibility determinations, the credibility determinations were relevant only in identifying the juror and did not relate to the merits of whether *any* juror engaged in misconduct.

Moreno additionally argues that the district court improperly denied the petition on the grounds that it was untimely. We need not address this argument because Moreno failed to establish a prima facie case for a *Schwartz* hearing.