STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0161

State of Minnesota,
Appellant,

vs.

Michael Bruce Tapper,
Respondent.

Filed August 1, 2022
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-21-21874

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

Tory R. Sailer, Eden Prairie City Prosecutor, David R. Hackworthy, Assistant City Prosecutor, Gregerson, Rosow, Johnson & Nilan, Ltd., Minneapolis, Minnesota (for appellant)

Drake D. Metzger, Jasmin Quiggle, Metzger Law Firm, LLC, Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Hooten, Judge.*

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

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

In this pretrial appeal, the state challenges the suppression of the complainant's recorded statements made to a police officer responding to a domestic-disturbance call. Because admission of the statements would violate the Confrontation Clause, we affirm.

FACTS

Early in the morning of November 27, 2021, police responded to a 911 call at an Eden Prairie apartment complex. At the scene, the responding officers encountered A.H., the complainant. A.H.'s conversation with one of the officers (recording officer) was captured on a body-camera recording (recording). Appellant State of Minnesota charged A.H.'s ex-husband, respondent Michael Bruce Tapper, with misdemeanor domestic assault. A.H. did not respond to the state's trial subpoena, so the state moved the district court to admit approximately the first eight-and-a-half minutes of the recording at trial. The following summarizes that portion of the recording.

The recording officer initially encounters A.H. while she is descending a common staircase. When she reaches the bottom, the recording officer asks A.H. which unit she lives in. A.H. responds, "I'm not leaving my kids. He punched me in the face. I don't know if he broke my nose, but he poured hand sanitizer all over my face and my eyes" and "I came out to call—have somebody call the police because I think he took my phone and he won't give it to me so—I had nobody to call. I have blood all over me." After the officer asks whether the blood is hers, A.H. confirms that it is and says, "He's just—he

threw me into the fireplace. I think—I'm gonna die this weekend if I don't—report." The recording does not clearly reveal blood on A.H. or her clothing.

The recording officer then asks, "Do you want somebody to come check you out, make sure you're okay?" A.H. responds, "Yeah. My head is really messed up. He kicked my head into the wall and he threw me into the—into the brick fireplace." The recording audio captures another officer knocking on a door and announcing, "Michael, come to the door, it's the police." A.H. indicates her youngest children are still in the apartment. The recording officer then radios dispatch for a "medics routine to check out a female."

The recording officer next obtains A.H.'s name and information about her relationship with Tapper and asks, "So what happened? I mean I didn't get the full story." A.H. describes several arguments, interactions, and prior instances of physical abuse with Tapper, including an argument that took place within the last day during which Tapper hit her. Another officer walks by, and A.H. advises that the back door is probably open and that each unit has a stairway leading to that door. The other officer asks, "If he left, where do you think he would've gone?" A.H. responds, "There's nowhere for him to go. I don't think he left. I don't know what is going on. He might've fallen asleep, he was drunk."

The recording officer then says, "So you guys came home and what happened from there?" A.H. states that they "had a little bit of an argument" and Tapper became increasingly aggressive. She says, "I just went to sleep though—like the last thing I want to do is—I mean—this time I actually have like physical—sometimes I haven't had anything that I can show, like it's mostly like back head wounds like he pushes me into some—or my head hits the wall and it isn't bruised up." A.H. indicates her oldest two

children can usually calm Tapper down. The recording officer asks, "So how many kids are in the apartment right now?" A.H. responds that three of her children (ages ten, six, and four) are still in the apartment. The recording officer instructs a third officer to go up to the apartment, and then takes A.H. outside to one of the squad cars to wait for medical assistance.

At the beginning of the recording, A.H. is sniffling and wiping her nose and eyes. But she soon gains her composure as she describes what happened and responds to questions. She does not raise her voice or cry.

The district court denied the state's motion to admit this portion of the recording, concluding that A.H.'s statements are inadmissible hearsay and testimonial so their admission would violate the Confrontation Clause. The state appeals.

DECISION

I. Suppression of the recording has a critical impact on the state's ability to prosecute this case.

The state may only appeal a pretrial ruling if "the district court's alleged error, unless reversed, will have a critical impact on the outcome of the trial." *State v. Stavish*, 868 N.W.2d 670, 674 (Minn. 2015) (quotation omitted). The state can make this showing when suppression of evidence "'completely destroys' the state's case" or "significantly reduces the likelihood of a successful prosecution." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quoting *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987)). The parties acknowledge that suppression of the recording satisfies the critical-impact test. We agree. Without the recording, there is no evidence identifying Tapper as the assailant. The district

court's exclusion of the recording has a critical impact because it "significantly reduces the likelihood of a successful prosecution." *Id.* (quotation omitted).

II. Admission of the recording would violate Tapper's confrontation right.

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. With limited exceptions not applicable here, the Confrontation Clause bars the admission of prior testimonial statements of an unavailable witness who was not subject to cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Whether the admission of evidence violates a defendant's rights under the Confrontation Clause is a question of law that we review de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

In determining whether a statement is testimonial, we consider the primary purpose of the interrogation. *State v. Wright*, 726 N.W.2d 464, 472 (Minn. 2007). We make this determination by "objectively evaluat[ing] the circumstances in which the encounter occurs and the statements and actions of the parties." *Michigan v. Bryant*, 562 U.S. 344, 359 (2011). When the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," the statement is testimonial. *Id.* at 356 (quotation omitted). Conversely, "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* (quotation omitted). This is so if the police questioning "relate[s] directly to addressing the emergency." *State v. Warsame*, 735 N.W.2d 684, 694 (Minn. 2007).

The state argues that the district court's suppression order is legally flawed because (1) it is based on clearly erroneous findings of fact and (2) A.H.'s statements were nontestimonial because they relate to an ongoing emergency. The state's first argument is misplaced. We do not read the district court's order to make findings of fact. Rather, the order characterizes the facts revealed in the recording as part of the district court's primary-purpose analysis. Our de novo review does not turn on the district court's characterization of the recording. To the contrary, we conduct our own analysis of the interrogation's primary purpose. We begin this analysis by reviewing the relevant caselaw.

In *Davis v. Washington*, a domestic-assault victim made statements to a 911 operator while the assailant was still in the home. 547 U.S. 813, 817 (2006). The Supreme Court cited four factors when concluding that the victim made the statements to meet an ongoing emergency: (1) the victim described events as they actually happened and not past events; (2) any "reasonable listener" would conclude that the victim was facing an ongoing emergency; (3) the questions asked and answers given were necessary to resolve a present emergency, rather than only to learn what had happened in the past; and (4) there was a low level of formality in the interview because the victim's answers were frantic and her environment was not tranquil or safe. *Id.* at 827.

Lack of formality and the victim's urgent need for medical care likewise guided the Supreme Court's determination in *Bryant* that a shooting victim's statements related to an ongoing emergency rather than establishing past events. 562 U.S. at 349. In that case, responding officers found the victim bleeding on the ground. *Id.* During a five- to ten-minute conversation, the victim gave police the assailant's name and told them when,

where, and how he had been shot. *Id.* The victim was then taken to the hospital where he died within hours. *Id.* The Supreme Court reasoned that the informality of the interrogation and the potential threat the at-large assailant posed to the victim, the police, and the general public objectively indicated that the "primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency." *Id.* at 375-78 (quotation omitted).

In contrast, the Supreme Court determined that no such ongoing emergency existed in *Crawford* and *Hammon v. Indiana*, 547 U.S. 813, 829 (2006), which was decided at the same time as *Davis*. In *Crawford*, the Supreme Court concluded that a recorded statement "knowingly given in response to structured police questioning" following a *Miranda* warning was testimonial. 541 U.S. at 38, 53 & n.4; *see also Davis*, 547 U.S. at 830 (observing that these circumstances in *Crawford* "made it more objectively apparent . . . that the [statement's] purpose . . . was to nail down the truth about past criminal events"). Likewise, in *Hammon*, though the facts presented a less formal interrogation than in *Crawford*, the Supreme Court determined that the primary purpose of the interrogation and statements in question was to establish past events. 547 U.S. at 830. The Supreme Court concluded "[t]here was no emergency in progress" because "the interrogating officer . . . heard no arguments or crashing and saw no one throw or break anything," the victim told the officers when they arrived "that things were fine" and "there was no immediate threat to her person," and the officer "was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.'" *Id.*

Minnesota's jurisprudence applies the *Davis/Hammon* principles. In *Wright*, our supreme court addressed the victim's statements to a 911 operator and those made to responding officers. 726 N.W.2d at 474-76. The former statements were nontestimonial because some were made before the assailant left the scene and others related to the 911 operator's efforts to calm and comfort the victim's sister. *Id.* at 474-75. But the victim's statements to officers were testimonial because the emergency had ended and officers elicited the statements to determine "what happened, not what was happening." *Id.* at 475-76; *see also State v. Her*, 750 N.W.2d 258, 269 (Minn. 2008) (concluding that the "record do[es] not indicate to an objective observer that police were attempting to resolve a present emergency" where the victim was upset and visibly injured but did not require emergency medical care or express fear of the assailant, and the assailant had left the scene), *vacated on other grounds*, 555 U.S. 1092 (2009). In contrast, in *Warsame*, our supreme court concluded that a victim's statements were nontestimonial where she appeared "wobbly" and "potentially faint," required immediate first aid, the officer called an ambulance, the assailant was not yet in custody, and the police officer's open-ended questioning about the events related "directly to addressing the emergency." 735 N.W.2d at 688, 694-95.

The circumstances here persuade us that A.H.'s statements to the recording officer are more like the testimonial statements in *Hammon* and *Wright* than the nontestimonial statements in *Davis* and *Warsame*. As in *Hammon*, A.H.'s statements report a past assault; there was no ongoing disturbance when the officers arrived on the scene. *See* 547 U.S. at 829. A.H. did not face any immediate threat from Tapper because he was inside the locked apartment. The record does not support the state's suggestion that the presence of the three

children in the apartment created an emergency. A.H. mentions the children twice and tells the recording officer that she will not leave them behind. But she does not express fear for their safety or indicate they have been harmed by Tapper in the past. The fact that Tapper was not in custody at the time A.H. made her statements does not compel a conclusion that the statements relate to an ongoing emergency. *See Bryant*, 562 U.S. at 361-70 (explaining that courts must evaluate the entirety of the circumstances to determine whether an interrogation relates to an ongoing emergency). A.H. stated that Tapper was asleep in the apartment, and officers were covering both exit points. In short, the circumstances did not reflect a risk of ongoing harm to A.H. or anyone else.

A.H.'s demeanor, the nature of her injuries, and the substance of her statements further persuade us that her statements were testimonial. She was sniffling, wiping her eyes and nose, and breathing rapidly when she started talking to the reporting officer. But she soon began to speak calmly and answered questions coherently. She said Tapper punched her in the face, that she had blood all over, and her head was "messed up." No significant amount of blood is visible. Yet the recording officer asks A.H. if she wants "someone to check you out" and A.H. responds affirmatively. Unlike the situation in *Warsame*, the reporting officer does not find it necessary to render first aid or to call for an ambulance. 735 N.W.2d at 687. And the conversation does not focus on A.H.'s medical condition. Most of the questions and responses relate to Tapper's conduct on the night in question and prior instances of abuse. A.H. described past events, and the recording officer's questions elicited information about what had happened in the past, not what was happening. *See Davis*, 547 U.S. at 826-27.

In sum, there are aspects of A.H.'s unprompted statements and answers to the recording officer's questions that relate to A.H.'s medical status and need for treatment.[1] But the primary purpose of the interrogation was to determine what Tapper had done that night, not how to resolve an ongoing emergency. As such, A.H.'s statements were testimonial. Admitting them would violate the Confrontation Clause.[2]

Affirmed.

[1] The state does not divide the recording and urge admission of certain segments as nontestimonial. Instead, it treats the first eight-and-a-half minutes of the recording as a whole, asserting that all of it is nontestimonial.

[2] Because we conclude the statements are not admissible based on the Confrontation Clause, we need not address whether the district court abused its discretion by excluding them as inadmissible hearsay.