STATE OF MINNESOTA
IN COURT OF APPEALS
A11-441

State of Minnesota,
Appellant,

vs.

William Franklin Wanner,
Respondent.

Filed October 11, 2011
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CR-09-63450

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Paul Engh, Minneapolis, Minnesota; and

Joseph S. Friedberg, Minneapolis, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Minge, Judge; and Bjorkman, Judge.

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

HALBROOKS, Judge

The state challenges the district court's pretrial order suppressing statements made during two recorded police interviews by the alleged victim of the criminal sexual

conduct charged against respondent. The state argues that the order will have a critical impact on its ability to prosecute its case and that the district court erred by suppressing the interviews based on Minn. Stat. § 626.556 (2008) and its determination that the interviews are unreliable hearsay. We affirm.

FACTS

On December 27, 2009, respondent William Franklin Wanner, then age 67, was in a swimming pool at the Minneapolis Athletic Club with A.A., a ten-year-old girl. A.A.'s mother is an acquaintance and former employee of Wanner. L.S., an adult woman who was using the pool at the same time, observed on December 27, 2009, that A.A.'s legs were wrapped around Wanner's waist and her arms around his neck. L.S. then saw Wanner "pull down the girl's bathing suit starting from the crotch . . . and stick his hand inside her swimsuit." L.S. got out of the pool, changed, and reported the incident to the club staff. L.S. reported the incident to the Minneapolis Police Department the following morning and provided descriptions of both Wanner and A.A. and their swimsuits.

Sergeant Bernard Martinson contacted the club and spoke to S.O., the club's chief financial officer. S.O. identified Wanner and A.A. and told Martinson that A.A. was Wanner's frequent guest at the club. S.O. also advised Martinson that there were surveillance cameras in the pool area and that the surveillance system stores recordings for 30 days. When S.O. reviewed the saved surveillance footage, he discovered, in addition to the recording of the December 27 incident, a recording taken on December 5, 2009, that shows Wanner and A.A. in a whirlpool at the club.

On December 29, 2009, A.A. took part in a CornerHouse interview. During this interview, A.A. denied that Wanner had touched her inappropriately. She explained that she and Wanner played a game in which Wanner would hide her goggles in her swimsuit and then search for them. A.A. said that Wanner may have accidentally touched her private parts during this game. A.A. also described a game in which Wanner and A.A. try to "blow up" their suits in the whirlpool.

Immediately following the CornerHouse interview, A.A., her parents, and Sergeant Martinson went to room 108 at city hall and Sergeant Martinson again questioned A.A. about her interactions with Wanner. Sergeant Martinson repeatedly accused A.A. of lying during the CornerHouse interview and attempted to get A.A. to admit that appellant had intentionally touched her. A.A. then admitted that Wanner had "massaged" her crotch while in the whirlpool and that Wanner told her it would make her "feel good" if he massaged her crotch. On December 31, 2009, Wanner was charged with two counts of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2008).

On January 5, 2010, Sergeant Martinson interviewed A.A. a second time—this time at her school. A.A.'s parents were not present, but the school counselor and a representative of the county child-protection services were present. The interview began with Sergeant Martinson asking A.A. to identify two swimsuits found during a search of Wanner's club locker. Sergeant Martinson then asked A.A. more questions about the alleged criminal sexual conduct, including whether Wanner had shown the girl "his private." A.A. responded, "A little bit," and stated that Wanner had her touch "his

private." A.A. also reported that Wanner had "massaged" her in his car on multiple occasions.

On June 10, 2010, Wanner moved to suppress the recordings of the room 108 and school interviews as well as the surveillance videos from the club. The district court granted Wanner's motions to suppress the interviews, but deferred ruling on the motion to suppress the surveillance videos until a later date. The district court excluded the recordings of the two interviews on the grounds that the interviews were conducted in violation of Minn. Stat. § 626.556, subd. 10(a)(4), and the evidence is unreliable hearsay. This appeal follows.

D E C I S I O N

I.

In a pretrial appeal of an order suppressing evidence in a criminal case, we will reverse the determination of the district court only "if the state demonstrates clearly and unequivocally that the [district] court has erred in its judgment and that, unless reversed, the error will have a critical impact on the outcome of the trial." *State v. Webber*, 262 N.W.2d 157, 159 (Minn. 1977). "Critical impact has been shown not only in those cases where the lack of the suppressed evidence completely destroys the state's case, but also in those cases where the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987). In order to determine whether suppression will have a critical impact on the state's case, we must

> first examine all the admissible evidence available to the state [and then] go on to examine the inherent qualities of the suppressed evidence itself, its relevance and probative force . . . its chronological proximity to the alleged crime, its effect in filling gaps in the evidence viewed as a whole, its quality as a perspective of events different than those otherwise available, its clarity and amount of detail and its origin.

In re Welfare of L.E.P., 594 N.W.2d 163, 168 (Minn. 1999) (citations omitted). "Suppressed evidence particularly unique in nature and quality is more likely to meet the critical impact test." *Id.*

A determination of critical impact does not implicate the merits of the appeal; rather, "[c]ritical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction." *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009). As such, "the critical impact of the suppression must be first determined before deciding whether the suppression order was made in error." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998).

Wanner is charged with second-degree criminal sexual conduct. The state's burden is to prove that he engaged in sexual contact with A.A., that A.A. was under 13 years of age at the time of the incident, and that Wanner is more than 36 months older than A.A. *See* Minn. Stat. § 609.343, subd. 1(a). Sexual contact, for purposes of this crime, is defined as "intentional touching by the actor of the complainant's intimate parts" and the act must be "committed with sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(a) (2008). If A.A. testifies, and if her testimony is consistent with her CornerHouse interview, the room 108 and school interviews may contain the only direct evidence the state can offer of Wanner's sexual intent. The surveillance video of

Wanner and A.A. in the swimming pool and the whirlpool shows physical contact between the two, but does not directly evince Wanner's intent. A.A.'s statements that Wanner told her that his massage of her genital area would make her "feel good" is therefore highly probative.

The state's evidence, without the two excluded interviews, consists primarily of L.S.'s testimony, the video of the CornerHouse interview, the December 5 video of the club's whirlpool area, and the December 27 video of the pool area.[1] The disputed interviews were conducted within two days of the alleged pool incident, and viewing them could afford the trier of fact an additional opportunity to judge A.A.'s credibility and demeanor, both of which may be central issues in this case. The room 108 interview was conducted with A.A.'s parents present, and the school interview was conducted in the presence of an employee of Hennepin County Child Protection and the school counselor, a psychologist. The opportunity to observe A.A.'s reactions in the company of these various adults could be of further assistance to the trier of fact. A.A. may or may not testify, and we cannot now know either the content of her testimony or its impact on the state's case.

But we believe that whether or not A.A. testifies, the suppression of the room 108 and school interviews clearly meets the critical-impact test. If she testifies but denies the charged conduct took place, the interviews are probative of her truthfulness and her motive for changing her story. If she gives testimony consistent with the disputed

[1] The district court subsequently ruled that the Minneapolis Club surveillance videos are admissible.

interviews, she will be subject to cross-examination based on the CornerHouse interview and the videos. The disputed interviews would be significant evidence buttressing A.A.'s credibility. If she does not testify, the interviews could be the state's only direct evidence of Wanner's intent. That we cannot know at this stage whether A.A. will testify does not preclude a determination as to critical impact. *See L.E.P.*, 594 N.W.2d at 169 (observing that "[t]he lack of certainty about whether [the alleged victim] will testify and what her testimony will be if she does testify should not . . . stand in the way of our reaching a conclusion as to critical impact").

It is true that there is more direct evidence of the alleged criminal sexual conduct in this case than in many such cases. But after considering the interviews in light of the criteria established by the supreme court, *see, e.g.*, *L.E.P.*, 594 N.W.2d at 168, we conclude that the state has satisfied its burden of demonstrating that the district court's pretrial order will have a critical impact on its case.

Wanner argues that the district court's ultimate decision to exclude the interviews as unreliable precludes a finding of critical impact, because unreliable evidence cannot, by definition, help the state's case. This argument puts the proverbial cart before the horse, disregarding the supreme court's clear dictate, announced in *State v. Zanter*, that critical impact is a threshold showing of appellate jurisdiction that, by logic and precedent, must be determined before this court can consider the merits of the suppression order. 535 N.W.2d 624, 630-31 (Minn. 1995); *see also Scott*, 584 N.W.2d at 416 (noting that "[i]n *Zanter*, we changed the sequence that we had used to address these issues from that used in [earlier critical-impact cases]"); *cf. Webber*, 262 N.W.2d at 159

(under pre-*Zanter* analysis, requiring the state to demonstrate error before considering critical impact). We therefore reject Wanner's suggestion that we consider the underlying merits as a factor in our critical-impact analysis and conclude that the state has shown that the exclusion of the room 108 and school interviews will significantly reduce its ability to successfully prosecute this case.

II.

We next determine whether the trial court erred in suppressing the interviews. "When reviewing pretrial orders on motions to suppress evidence, [an appellate court] may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). The district court here suppressed the recordings of the room 108 and school interviews on the grounds that both were inadmissible hearsay and neither was characterized by the circumstantial guarantees of trustworthiness required by the residual exception to the hearsay rules. We agree and hold that the district court did not err by suppressing the interviews.

There are three possible scenarios we consider in determining the admissibility of the room 108 and school interviews. We will assume for the first that A.A. does not testify at trial. In *Crawford v. Washington*, the United States Supreme Court concluded that the Confrontation Clause of the Sixth Amendment prohibits the "admission of testimonial statements of a witness who [does] not appear at trial unless he [is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004); *see also State v.*

Warsame, 735 N.W.2d 684, 689 (Minn. 2007). Statements are "testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 2273-74 (2006). An "interrogation" includes a "recorded statement, knowingly given in response to structured police questioning." *Crawford*, 541 U.S. at 53 n.4, 124 S. Ct. at 1365 n.4.

It is undisputed here that the room 108 and school interviews were conducted by the police in order to develop a factual basis for determining whether to bring criminal charges against Wanner. As such, both interviews were testimonial, and their admission would violate Wanner's Sixth Amendment right to confront witnesses against him. *See Bobadilla v. Carlson*, 575 F.3d 785, 793 (8th Cir. 2009) (holding that a CornerHouse-style interview of a child victim of sexual abuse is testimonial in nature (even if the interview is conducted by a social worker instead of the police) and is inadmissible at trial if the child does not testify), *cert. denied*, 130 S. Ct. 1081 (2010). The district court did not err under this scenario by suppressing the two interviews.

For the second scenario, we will assume that A.A. gives testimony that is inconsistent with the statements she made in the room 108 and school interviews—that is, she denies at trial that Wanner engaged in the charged conduct and the state uses the room 108 and school interviews to impeach her testimony and not as substantive evidence of Wanner's guilt. Minn. R. Evid. 801(d)(1)(A) provides that such a statement—a prior inconsistent statement by a testifying witness—is not hearsay, and is

therefore admissible, provided the prior statement "was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Because neither the room 108 nor the school interview was given under oath, neither can be admitted under this rule. We further note that using a prior unsworn statement, "even where limited to impeachment, necessarily increases the possibility that a defendant may be convicted on the basis of unsworn evidence, for despite proper instructions to the jury, it is often difficult for them to distinguish between impeachment and substantive evidence." *United States v. Morlang*, 531 F.2d 183, 190 (4th Cir. 1975); *see also United States v. Buffalo*, 358 F.3d 519, 523 (8th Cir. 2004) (prohibiting impeachment with a prior inconsistent statement when employed as a mere subterfuge to get before the jury evidence not otherwise admissible) (quotation omitted).

Despite being inadmissible under Minn. R. Evid. 801(d)(1)(A), the room 108 and school interviews could conceivably be admitted under Minn. R. Evid. 807, the residual, or catch-all, exception to the hearsay rule. Rule 807 provides that an out-of-court statement not otherwise admissible under the rules prohibiting hearsay may be admitted, provided, among other characteristics, that it has "equivalent circumstantial guarantees of trustworthiness."

The record before us is clear that neither contested interview had the requisite guarantees of trustworthiness. In the room 108 interview, conducted immediately after the hour-long CornerHouse interview, Sergeant Martinson asked A.A. leading and arguably combative questions, frequently did not allow her to answer before asking another question or making another statement, and accused her of lying in the

CornerHouse interview. Many of A.A.'s responses simply cannot be heard, and few, if any, of them sound spontaneous. The school interview proceeded similarly. Sergeant Martinson repeated many of the same questions he asked in the room 108 interview, and, in the words of the district court, "badgered" A.A. until she answered his questions to his satisfaction. Although Sergeant Martinson began the interview with the stated intention of having A.A. identify the bathing suits that she and Wanner were wearing at the time the charged conduct occurred, he soon began asking leading questions to compel A.A. to state with specificity the number of times Wanner "touched" her and the number of times the two swam together. Sergeant Martinson repeatedly suggested that A.A. lied during the CornerHouse interview and challenged her to explain the discrepancies between her account of the charged conduct and the conduct he saw on the surveillance videos. Both interviews lack circumstantial guaranties of trustworthiness and are inadmissible under rule 807.

Under the third scenario, the room 108 and school interviews would be introduced pursuant to Minn. R. Evid. 801(d)(1)(B), which provides that an out-of-court statement is not hearsay if the declarant testifies at trial, is subject to cross-examination, and the statement is "consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." There is no requirement that the earlier statement be given under oath. Therefore, if A.A. testifies that Wanner's conduct toward her was as charged and her credibility becomes an issue, the district court may determine that the two contested interviews would help the trier of fact evaluate her credibility and admit the interviews for that limited purpose. We note that the same risks

of jeopardizing Wanner's right to a fair trial posed by admitting the unsworn interviews to impeach A.A. under rule 801(d)(1)(A) are present should the district court determine that the interviews are admissible under rule 801(d)(1)(B) to evaluate her credibility. In any case, the determination as to whether the contested interviews will be admissible as prior consistent statements at trial will depend on the nature of A.A.'s testimony, the district court's assessment of A.A.'s credibility, and other contingencies that cannot be known until trial. As such, and as the district court concluded, it would be premature, and impossible, to correctly determine at this stage whether the room 108 and school interviews will be admissible as prior consistent statements under Minn. R. Evid. 801(d)(1)(B).

Because we find that both interviews were properly excluded as inadmissible hearsay, we do not address the state's argument that the district court erred by excluding the interviews as conducted in violation of Minn. Stat. § 626.556, subd. 10(a)(4).

Affirmed.