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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-1871**

State of Minnesota,  
Appellant,

vs.

Alonzo Lee Colbert,  
Respondent.

**Filed March 10, 2014  
Affirmed  
Connolly, Judge**

Mille Lacs County District Court  
File No. 48-CR-13-1331

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

Janice S. Jude, Mille Lacs County Attorney, Melissa M. Saterbak, Assistant County Attorney, Milaca, Minnesota (for appellant)

Sharon E. Jacks, Minneapolis, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Connolly, Judge; and Crippen,  
Judge.\*

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

## UNPUBLISHED OPINION

CONNOLLY, Judge

In this pretrial appeal, appellant, the State of Minnesota, argues that the district court erred by suppressing certain statements made by the alleged victim of a domestic assault. We affirm.

### FACTS

On June 22, 2013, at approximately 2:01 a.m., a 911 caller reported that she heard a woman in the next apartment asking for help. The caller said that there was a man next door and she was worried that the woman was being assaulted. The call ended when the woman in the next apartment left.

Less than five minutes later, the alleged victim, A.I., called 911. The 911 operator asked for A.I.'s name and whether she needed an ambulance. A.I. gave her name and said she did not need medical assistance. She reported that her boyfriend, respondent Alonzo Colbert, had assaulted her in their apartment and broken her phone when she tried to call 911. A.I. said that a friend picked her up from the apartment and that she was safe. She also said that respondent stayed in the apartment after the alleged assault.

The 911 operator told A.I. that an officer would like to speak with her to “hold your boyfriend accountable for what he’s done to you.” A.I. said that a friend was driving her to a local casino and that an officer could speak with her there.

Approximately 30 minutes later, a police deputy met A.I. at the casino. He asked A.I. what she wanted to speak with him about. A.I. responded that her boyfriend “started slamming [her] around,” and that he broke her phone when she tried to call 911. The

deputy then asked, “Is this something you want reported and then sent in for charging . . . or do you just want to document it?”

Respondent was charged with felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2012), and gross misdemeanor interference with an emergency call in violation of Minn. Stat. § 609.78, subd. 2 (2012). Before trial, the state subpoenaed A.I. but was unable to locate her. Thereafter, the state filed its notice of intent to introduce statements made by A.I. to the 911 operator and the deputy. Respondent moved to exclude the statements on the theory that admitting them would violate his rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. The district court ruled that portions of the 911 call and all of the on-scene interview were inadmissible because they violated respondent’s rights under the Confrontation Clause, but that a redacted copy of the 911 call would be admissible at trial.<sup>1</sup>

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<sup>1</sup> The district court suppressed the following portions of the 911 call.

911: Who hurt—who hurt you?

A.I.: My boyfriend (INAUDIBLE)

...

911: Okay, your boyfriend broke your phone when you tried to call?

A.I.: Yeah.

...

911: Well, (inaudible) the officer’s gonna wanna talk to you. Uh, is there a place where the officer can talk to you?

A.I.: (Inaudible) officer wants to talk to me.

911: Well, what we’re gonna do is the officer is gonna make sure that your—your boyfriend is—is if he can find your boyfriend. But then he’s gonna wanna talk to you so that [they] can hold your boyfriend accountable for what he’s done to you. Because it’s not okay.

## DECISION

In a pretrial appeal from a suppression order, the state has the burden of showing “clearly and unequivocally (1) that the district court’s ruling was erroneous and (2) that the ruling will have a ‘critical impact’ on the [s]tate’s ability to prosecute the case.” *State v. Underdahl*, 767 N.W.2d 677, 683 (Minn. 2009) (quoting *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005)).

### I.

The state argues that the district court’s suppression order will have a critical impact on the prosecution of this case. We agree. A pretrial order has a critical impact

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A.I.: Okay.

911: What did he do?

A.I.: He (inaudible) and he slamming me on the ground (inaudible). I don’t know why, I mean he’s [f---ing] drunk.

...

911: Okay. And you—you don’t know—he’s just been drinking, you don’t know why he hurt you?

...

911: Yeah. Did he hit you?

A.I.: He like slapped me in the face and started pushing me around and I wanted to get out of there and he wouldn’t let me leave.

...

A.I.: I—I’m okay. He just like, just slammed me around and like hit me like in the back of the head.

911: Okay. It’s not okay. It’s not okay for anybody to hurt you.

...

911: Yeah, we got another call [about this incident] too ‘cuz they were concerned about—about you bein’ okay and they wanted to make sure you were okay. Is that where you normally (inaudible).

on the state's case if it "significantly reduces the likelihood of a successful prosecution." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotation omitted).

The parties in this case do not dispute that the district court's suppression order has a critical impact on the state's case. The state cannot locate A.I., and the district court suppressed the most incriminating portions of the 911 call, including A.I.'s statement that respondent broke her phone when she tried to call 911 and most of the details of the alleged assault. Without the suppressed evidence, the state is left with the following evidence: the initial 911 caller's testimony that she heard a woman asking for help on the night of the alleged assault, A.I.'s name and location, respondent's name, and the fact that A.I. was safe and did not need medical attention. Because we conclude that the state's likelihood of a successful prosecution is reduced, the pretrial suppression order has a critical impact on the prosecution. *See id.*

## II.

The state argues that the district court erred in concluding that portions of A.I.'s 911 call and interview with the deputy were testimonial and inadmissible under the Confrontation Clause. Generally, we will not reverse a district court's evidentiary rulings absent a clear abuse of discretion. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006). But whether the admission of evidence violates a criminal defendant's Confrontation Clause rights is a question of law we review de novo. *Id.*

The Confrontation Clause of 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. The Confrontation Clause bars “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53-54, 124 S. Ct. 1354, 1365 (2004).

This court must first determine whether the statements at issue are testimonial. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 2273 (2006). Whether a statement is testimonial turns on the primary purpose served by the questioning:

Statements are nontestimonial when made . . . under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at 822, 126 S. Ct. at 2273-74. We consider four factors in determining whether the victim’s statements were made 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.

*State v. Warsame*, 735 N.W.2d 684, 690 (Minn. 2007) (quotation omitted). “The state has the burden of proving that a particular statement does not violate a defendant’s Sixth Amendment rights.” *Id.* at 696.

**A. 911 call**

The state argues that the district court erred by determining that portions of A.I.'s 911 call are testimonial. We disagree. We analyze 911 calls on a case-by-case basis to determine whether they contain testimonial statements. *State v. Wright*, 726 N.W.2d 464, 473-74 (2007).

The state relies on *Wright*, 726 N.W.2d at 464, and *State v. Washington*, 725 N.W.2d 125 (Minn. App. 2006), *review denied* (Minn. Mar. 20, 2007) to argue that the district court erred in determining that portions of A.I.'s 911 call are testimonial. In *Wright*, Wright's girlfriend called 911 and reported that Wright pointed a gun at her and her sister inside their shared apartment. *Id.* at 467-68. The operator informed the women when Wright was in police custody. *Id.* at 468. When the sister continued to express concerns about her safety, the operator assured her that the situation was under control. *Id.* These statements were found to be nontestimonial; the emergency was ongoing until Wright was in custody because he had a weapon and access to the apartment. *Id.* at 474-75. After Wright was in custody, the primary purpose of the call was to comfort the sister. *Id.* at 476.

In *Washington*, a woman called 911 and told the operator that Washington assaulted her in the hallway of her apartment. 725 N.W.2d at 130. The 911 operator believed that the caller was being assaulted during the call. *Id.* During the conversation, Washington left the apartment. *Id.* The 911 call was found to be nontestimonial because the questions sought information necessary to identify the suspect and resolve the ongoing emergency; the victim was being assaulted during the call, and the questions

were asked to obtain descriptive information necessary for the police to identify and locate the fleeing assailant. *Id.* at 133.

Unlike the statements in *Wright* and *Washington*, we conclude that the suppressed statements in this case did not describe an ongoing emergency. A.I. recounted past events by explaining the assault. She stated that respondent had assaulted her and broken her phone and that he was intoxicated. She did not express fear for her safety or indicate that she was facing a threat of harm.

Similarly, the 911 operator asked questions to determine what happened in the past, rather than what was presently happening. The operator asked questions about whether respondent was drinking and why he attacked A.I. These questions are not clearly relevant to resolving an ongoing emergency, but instead establish past events. The operator told A.I. that police would want to speak with her to “hold [her] boyfriend accountable . . . . Because it’s not okay,” indicating that the primary purpose of the interview was to “prove past events potentially relevant to later criminal prosecution.” *Davis*, 547 U.S. at 822, 126 S. Ct. 2274.

Moreover, a reasonable listener would conclude that A.I. was not facing an ongoing emergency. Unlike the situation in *Washington*, A.I. was not being assaulted when she called 911; she was with her friend, in her friend’s car, driving to a safe location, and she did not need medical attention. Unlike the situations in both *Wright* and *Washington*, where the assailants had the ability to return to the crime scene to assault the victims, there is no indication here that respondent had access to A.I. or that he was

following her. In fact, A.I. told the 911 operator that respondent stayed in the apartment after she left.

We conclude that the primary purpose of the 911 call was to prove past events potentially relevant to a later criminal prosecution, not to resolve an ongoing emergency. The district court did not err in suppressing the testimonial statements in the 911 call.

**B. Statements to the deputy**

Next, the state argues that the district court erred in suppressing A.I.'s interview with the deputy as testimonial hearsay violating the Confrontation Clause. We disagree.

The state cites *Washington* to argue that the interview is nontestimonial because officers called to investigate domestic assaults often need to assess the situation, ensure their safety, and evaluate any danger to the complainant. 725 N.W.2d at 133. In *Washington*, when officers arrived at the scene of the assault, the victim reported that Washington had kicked her door in, hit her with the broken doorframe, and bitten her before leaving. *Id.* at 132. The officers asked questions about the vehicle Washington was driving and the extent of the victim's injuries. *Id.* The victim asked the officers to stay with her so that she would not be assaulted again. *Id.* This court determined that those statements were nontestimonial because they "centered on observing the damage to [the victim's] doorframe, evaluating the extent of [the victim's] injuries, obtaining information that could help determine Washington's whereabouts, and providing for [the victim's] safety." *Id.*

In this case, the deputy met A.I. at a casino, which was not the scene of the assault. He asked A.I. what happened, why respondent and A.I. were arguing, how A.I. got out of

the apartment, how long the two had been in a relationship, and whether respondent had previously been arrested for domestic assault. He also asked if A.I. had any marks on her body but did not inquire further after he determined that A.I. only had a small scratch. The deputy asked A.I. twice whether she wanted to submit this case for charging. We conclude that the questions in this case, unlike the questions asked in *Washington*, were not centered on A.I.'s injuries or on locating respondent, but rather focused on establishing past events.

Likewise, A.I.'s statements to the deputy concerned what happened during the assault rather than what was currently happening. The interview took place approximately 30 minutes after A.I.'s initial 911 call, and A.I. was miles away from the scene of the crime. A.I. did not indicate that she needed medical attention, that she was afraid for her well-being, or that she was concerned about respondent's whereabouts. Based on this conversation, a reasonable listener would conclude that A.I. was not facing an ongoing emergency. We conclude that the district court did not err in determining that this statement was testimonial and violates respondent's rights to confrontation.

### **III.**

The state also argues that the district court erred in determining that A.I.'s interview with the deputy is inadmissible hearsay. Because we conclude that the statement violates respondent's rights under the Confrontation Clause, we need not reach that issue.

**Affirmed.**