STATE OF MINNESOTA
IN COURT OF APPEALS
A07-884

State of Minnesota,
Appellant,

vs.

Dontae Donnell Farmer,
Respondent.

Filed February 5, 2008
Affirmed; motion denied
Peterson, Judge

Hennepin County District Court
File No. 06077002

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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John M. Stuart, State Public Defender, 2221 University Avenue Southeast, Suite 425, Minneapolis, MN 55414; and

Leonardo Castro, Chief Fourth Judicial District Public Defender, James A. Kamin, Assistant Public Defender, 317 Second Avenue South, Suite 200, Minneapolis, MN 55402 (for respondent)

Considered and decided by Willis, Presiding Judge; Peterson, Judge; and Wright, Judge.

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

PETERSON, Judge

In this pretrial appeal, appellant argues that the suppression of a recording of a 911 call (1) had a critical impact on the proceeding because the victim failed to respond to a subpoena; and (2) was clearly erroneous because the statements in the recording were not testimonial and admitting the recording would not have violated the respondent's Confrontation Clause rights. Because the state has failed to show that the district court erred in determining that statements in the recording were inadmissible hearsay, we affirm the pretrial ruling; we deny respondent's motion to strike.

FACTS

Deephaven police responded to a 911 call from E.N. reporting an assault by respondent Dontae Donnell Farmer. During the 911 call and in a statement to a responding police officer, E.N. stated that Farmer pushed her against a wall, choked her, and hit her in the face. E.N. later provided a witness statement, claiming that she had started the fight with Farmer. She also wrote a letter to the city attorney, requesting that Farmer not be prosecuted.

Farmer was charged with one count each of misdemeanor domestic assault and disorderly conduct. The state subpoenaed E.N. to testify at trial, but she did not appear. The case was continued until the next day, and a warrant was supposed to be issued for E.N.'s arrest, but due to technical difficulties, the warrant was not issued. E.N. did not appear for trial the next day.

The state was prepared to proceed to trial based on a tape recording of the 911 call and the responding officers' testimony. Following a discussion in chambers, Farmer moved that the tape recording of the 911 call be suppressed, arguing that statements in the recording did not qualify as excited utterances and that admitting the recording would violate the Confrontation Clause. The district court granted Farmer's motion. This appeal followed.

D E C I S I O N

I.

When reviewing a pretrial appeal by the prosecution, "this court 'will only reverse the determination of the trial court if the state demonstrates clearly and unequivocally that the trial 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. Vonderharr*, 733 N.W.2d 847, 850 (Minn. App. 2007) (quoting *State v. Webber*, 262 N.W.2d 157, 159 (Minn. 1977)) (other quotation omitted) (footnote omitted). A pretrial order that "significantly reduces the likelihood of a successful prosecution" has a critical impact on the state's case. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998).

Without E.N.'s testimony, the state had the following evidence against Farmer: the 911 tape, initial statements to responding officers, and later statements to police. The initial and later statements to police would be inadmissible under *Crawford*. *See State v. Wright*, 726 N.W.2d 464, 476 (Minn. 2007) (concluding that statements made to police after emergency ended were testimonial). Thus, without the 911 tape, the prosecution had insufficient evidence to proceed to trial. We find no authority supporting Farmer's

position that the state had an affirmative obligation to do more than it did to effect execution of the arrest warrant. The state has satisfied its burden to show that suppression of the 911 tape will have a critical impact on the outcome of the trial.

On appeal, the only issue regarding admissibility addressed by the state is whether the district court erred in concluding that admitting the tape of the 911 call would violate Farmer's rights under the Confrontation Clause as interpreted by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004).[1] Even if we assume that E.N.'s statements to the 911 operator were nontestimonial under *Crawford* and admitting the tape recording would not violate the Confrontation Clause, there remains the issue of whether the statements in the recording were admissible under the Minnesota Rules of Evidence. The admissibility of nontestimonial hearsay statements "depends on whether the statements are admissible under Minnesota's evidence law." *State v. Warsame*, 701 N.W.2d 305, 312 (Minn. App. 2005), *vacated on other grounds*, 126 S. Ct. 2983 (2006); *see State v. Bobadilla*, 709 N.W.2d 243, 256 & n.8 (Minn. 2006) (quoting *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374 (stating that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law")) (addressing requirements for admissibility under statute

[1] The state apparently assumed that nontestimonial statements are automatically admissible at trial. In *Wright*, after concluding that statements to a 911 operator were nontestimonial, the supreme court stated that the statements were admissible at trial. *Wright*, 726 N.W.2d at 474. But because the supreme court granted Wright's petition for review only on the *Crawford* issue, this statement does not mean that a nontestimonial statement is automatically admissible without regard to the rules of evidence. *Id.* at 471.

and rules of evidence after determining that statements were nontestimonial under *Crawford*), *cert. denied*, 127 S. Ct. 382 (2006).

To prevail on appeal, the state has the burden of showing "clearly and unequivocally that the trial court has erred in its judgment." *Vonderharr*, 733 N.W.2d at 850. Because the state has made no showing that the district court erred in determining that E.N.'s statements to the 911 operator did not qualify as excited utterances and were therefore inadmissible hearsay, the state has made an insufficient showing to obtain reversal of the district court's decision.[2]

II.

Farmer moved to strike the state's supplemental brief, arguing that the brief does not comply with this court's August 31, 2007 order and is more in the nature of a reply brief, which is not authorized under Minn. R. Crim. P. 28.04, subd. 2(3). Although

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[2] It appears that before the suppression hearing, counsel discussed the admissibility of the tape recording with the district court in chambers, the court made a ruling, and the parties then attempted to present the issues on the record. The transcript of the hearing that followed demonstrates that both a hearsay issue and a Confrontation Clause issue were presented to the district court. The basis for the district court's ruling on the hearsay issue is not entirely clear, but it appears that the district court concluded that the statements that E.N. made during the 911 call did not qualify as excited utterances because of the passage of time between the events that E.N. reported and the time she made the call. Because the state has made no showing that the district court erred with respect to the hearsay issue, the limited record does not prevent us from concluding that the state failed to meet its burden of showing error. But because our review of this appeal has highlighted the importance of a complete record, we remind counsel of the long-established principle "that a party seeking review has a duty to see that the appellate court is presented with a record which is sufficient to show the alleged errors and all matters necessary to consider the questions presented." *State v. Carlson*, 281 Minn. 564, 566, 161 N.W.2d 38, 40 (1968).

Farmer's description of the state's supplemental brief is accurate, none of the information in the supplemental brief affects this court's decision on the merits of this case. It is unnecessary for this court to address the merits of a motion to strike portions of a brief that we do not rely on in reaching our decision. *Berge v. Comm'r of Pub. Safety*, 588 N.W.2d 177, 180 (Minn. App. 1999). On this basis, we deny Farmer's motion.

Affirmed; motion to strike denied.