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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1282**

State of Minnesota,
Appellant,

vs.

Terry Carlton Ross,
Respondent.

**Filed December 9, 2008
Reversed; motion to strike granted
and motions to supplement denied
Klaphake, Judge**

Winona County District Court
File No. 85-CR-08-1173

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Considered and decided by Lansing, Presiding Judge; Klaphake, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Respondent Terry Carlton Ross was arrested and interrogated at the Winona County Law Enforcement Center in connection with alleged criminal sexual conduct involving a 13-year-old victim. The district court granted respondent's motion to suppress a portion of this interrogation based on a violation of the custodial recording requirement of *State v. Scales*, 518 N.W.2d 587 (1994). Because suppression will have a critical impact on prosecution and because the record does not demonstrate a substantial violation of *Scales*, we reverse. We grant respondent's motion to strike materials contained in the appendix to appellant's reply brief that are outside the record and deny appellant's motions to supplement the record with these materials and the bail modification hearing transcript.

DECISION

I. Critical Impact

Minn. R. Crim. P. 28.04, subd. 1(1), gives the state the right to appeal erroneous pretrial suppression orders in felony cases if the state can clearly and unequivocally show that the order will have a critical impact on its ability to prosecute the defendant successfully. *State v. Rambahal*, 751 N.W.2d 84, 89 (Minn. 2008); *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998). "Excluded evidence that is particularly unique in nature and quality is more likely to meet the critical impact test." *State v. McLeod*, 705 N.W.2d 776, 785 (Minn. 2005) (quotation omitted). Generally, suppression of a defendant's confession will have a critical impact on the prosecution. *Scott*, 584 N.W.2d at 416.

Minnesota's appellate courts have repeatedly held that the suppression of a confession in a criminal sexual conduct case has a critical impact at trial. *See, e.g., State v. Ronnebaum*, 449 N.W.2d 722, 723-24 (Minn. 1990); *State v. Anderson*, 396 N.W.2d 564 (Minn. 1986) (reversing appellate court's ruling that suppressed confession in sexual conduct prosecution did not have a critical impact).

The suppressed evidence at issue here is a portion of respondent's interrogation, during which he confessed his knowledge of the victim, admitted that the victim performed oral sex on him, and identified the specific apartment where this act took place. This confession is critical to the success of the prosecution because it corroborates the allegations of a young victim, and no other physical or scientific evidence corroborates her allegations, and her credibility and reliability are in question. *See State v. Hanson*, 355 N.W.2d 328, 329 (Minn. App. 1984) (ruling that corroboration of details of a child victim's story had critical impact). The victim here initially denied any sexual contact and then asserted sexual assault claims against respondent and others more than a month after the alleged incidents occurred. In addition, the record includes allegations that respondent contacted his cousins from jail to ask them to pressure the victim to recant.

"The determination of the critical impact of evidence upon a trial yet to occur is, by its nature, forward-looking." *McLeod*, 705 N.W.2d at 786. Because of the victim's age, previous inconsistent statements, possible vulnerability to pressure to recant, and the lack of corroborating physical evidence, we conclude that the suppression of respondent's confession meets the critical impact test.

II. *Scales* Violation

Scales requires the recording of custodial interrogations, including any information given to defendants about their constitutional rights. *Scales*, 518 N.W.2d at 592. Only substantial *Scales* violations require the remedy of suppression, and the question of whether a *Scales* violation is substantial “is a legal question, subject to de novo review.” *State v. Inman*, 692 N.W.2d 76, 79, 81 (Minn. 2005). A *Scales* violation is “substantial” if it is prejudicial to the accused, such as “if the accused alleges, contrary to the prosecution’s assertions, that no *Miranda* warning was given or that he did not waive his *Miranda* rights.” *Id.* at 81. The underlying rationale of the *Scales* recording requirement is “to prevent factual disputes about the existence and content of *Miranda* warnings and any ensuing waiver of rights.” *Id.* at 80, n.4. In determining whether a violation is substantial, courts may also examine the willfulness of the violation, the extent to which suppression will prevent future violations, and the extent to which the violation likely influenced the defendant’s decision to make the statement. *Id.* at 80, n.3.

Here, the partial recording of the custodial interrogation includes all of the *Miranda* warning and respondent’s *Miranda* waiver. Further, the district court specifically found that the violation was not willful, but was the result of a technological failure or defect. We conclude that suppression is not necessary to deter future violations because the record shows that the Winona police department installed a redundant recording system in the interrogation room even before the suppression order. In addition, the failure to record respondent’s interrogation could not have influenced his

decision to make the statement because it is unclear whether he knew the interrogation was recorded, and he does not now claim that he was misled in any way.

Under these circumstances, we conclude that the district court erred in suppressing the unrecorded portion of respondent's custodial interrogation because the failure to record a portion of that interrogation was not a substantial violation of *Scales*.

III. Materials Outside of the Record

The record on appeal is comprised of the papers filed in the trial court, along with the exhibits and the transcript of the proceedings. Minn. R. Civ. App. P. 110.01; *see* Minn. R. Crim. P. 28.02, subd. 8 (similarly defining the record on appeal). As an appellate court, we may not base our “decision on matters outside the record on appeal.” *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). As such, we will strike from the parties' briefs references to matters that are outside the district court record. *Brodsky v. Brodsky*, 733 N.W.2d 471, 479 (Minn. App. 2007).

The appendix to appellant's reply brief contains two reports summarizing police interviews taken on April 14, 2008; a summary of a witness meeting on September 5, 2008, in connection with a different trial; and compact discs of three recorded police interviews taken during April 2008. Appellant concedes that none of these materials were offered, received into evidence, or filed in the district court. By separate motion, appellant has also requested this court to supplement the record with the transcript from respondent's bail modification hearing that occurred after this appeal was taken. All of these materials are outside the record. We are not persuaded by appellant's argument that this court should use its inherent power to “look beyond the lower court record where the

orderly administration of justice commends it.” *In re Petition for Certain Records of McLeod County Juv. Court*, 352 N.W.2d 24, 27 (Minn. App. 1984). In that case, the materials outside of the record were scholarly literature not subject to a claim of inaccuracy, and the petitioner did not object to their admission. *Id.* We decline to exercise our inherent authority here, because the disputed materials have no such indication of accuracy, respondent objected to their admission, and justice would not be served by their inclusion as they are not necessary to determine critical impact.¹

We therefore strike the appendix to appellant’s reply brief and all references in the reply brief to those materials that are outside the record, and we refuse to supplement the record with the bail modification hearing transcript.

Reversed; motion to strike granted and motions to supplement denied.

¹ Appellant has submitted the disputed materials to this court in response to respondent’s argument that a reviewing court must first evaluate all of the state’s admissible evidence as a whole in order to determine whether the exclusion of particular evidence will have critical impact. *State v. Zanter*, 535 N.W.2d 624, 631 (Minn. 1995). In *Zanter*, the suppressed evidence provided a necessary link in a chain of circumstantial evidence and it was therefore necessary for the court to view the suppressed evidence in the context of all of the evidence to determine critical impact. The state is not obligated to submit *all* potential admissible evidence for review when such evidence is not necessary to determine the critical impact of the suppressed evidence.