**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-1591**

State of Minnesota,
Appellant,

vs.

Danya Mandrell McKinnie,
Respondent.

**Filed April 14, 2009**
**Affirmed in part and reversed in part; motion denied**
**Toussaint, Chief Judge**

Anoka County District Court
File No. 02-CR-08-3593

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

Robert M.A. Johnson, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303 (for appellant)

Bradford S. Delapena, Special Assistant State Public Defender, Post Office Box 40418, St. Paul, MN 55104; and

William M. Ward, Tenth District Chief Public Defender, Shawn P. Webb, Assistant Public Defender, 433 Jackson Street, Suite 120, Anoka, MN 55303 (for respondent)

Considered and decided by Toussaint, Chief Judge; Worke, Judge; and Randall, Judge.*

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

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

**TOUSSAINT**, Chief Judge

Appellant State of Minnesota challenges the district court order suppressing statements of respondent Danya Mandrell McKinnie in a second-degree murder prosecution. Because the district court's findings that the detective violated respondent's equivocally-invoked right to counsel by continuing interrogation and that respondent did not waive his right to counsel are not clearly erroneous, we affirm in part. But because respondent's statements were voluntarily given and the district court's finding that they could not be used for any purpose at trial was clearly erroneous, we reverse in part. Appellant's motion to correct the record is denied.

## F A C T S

On March 17, 2008, respondent was arrested on suspicion of robbery, assault, and second-degree murder, and he was transported to the Anoka County Sheriff's Office for videotaped questioning. A detective read respondent the following *Miranda* warning:

> The Constitution requires that I inform you that you have the right to remain silent. Anything you say will be used in court as evidence against you. You are entitled to talk to a lawyer now. And have him present now. Or at any time during questioning.
>
> . . . .
>
> If you cannot afford a lawyer, one will be appointed for you without cost.

Respondent immediately responded, "I can't afford one." The following exchange between the detective and respondent then took place:

> Q. Do you understand these rights?
> A. Yes I do.

Q. All right. Do you wish to talk to me at this time?
A. I will talk to you.
Q. Okay.
A. But I still can't afford a lawyer.

Q. Oh. Okay. Well that's . . . but you wanna talk to me right?
A. Yeah. I'll talk to you.

Q. Okay.
A. I have no problem with it.

. . . .

A. . . . I don't have no money for no lawyer because I lost my job.

Q. . . . if you can't afford one the state will afford a lawyer for you.
A. Can he be here right now?

Q. That's your choice Danya.
A. Could he be right now though?

Q. Do you want a lawyer?
A. (Inaudible).

Q. No not right now. Not right now. If you want a . . . lawyer while in questioning.
A. Mhm-hum. And represent I have to sit here.

Q. But no. If you wanna talk to me you can talk to me.
A. No. What I'm---no what I'm asking is if I had to wait on a lawyer I would have to sit here (inaudible) until he got here right?

Q. Right.

Next, the detective attempted to explain to respondent how an attorney would be appointed:

Q. When you went to court then a lawyer will be appointed for you at that time. Okay. That's how it works.
A. Okay.

Q. You can't get a court appointed . . . lawyer . . . the way I understand it until you've been charged with something.
A. No because I would like you know what I'm sayin'? What's that that they do consultants and everything like---we---talk to somebody or whatnot. It is like a consultant.

Q. . . . I don't know anything about that Danya. I don't.
A. Because I don't wanna sit here. . . .

The next morning, the detective audio recorded another conversation with respondent. After the interview was concluded, the detective turned off the recorder and stood up to leave, but respondent said he wanted to tell him more. So the detective reactivated the audio recorder, and the interview continued.

During the interviews, respondent made several admissions. He was charged by amended complaint with second-degree murder while committing the felony of robbery, second-degree murder while committing the felony of third-degree assault, and first-degree aggravated robbery. Respondent was appointed a public defender and moved to suppress all statements. He pleaded not guilty to all counts.

The district court granted respondent's motion to suppress the statements, concluding that he equivocally invoked his right to counsel. The district court wrote:

> It is clear that [the detective] told [respondent] that he would be held in custody if he did not speak with [the detective] and that an attorney would not be appointed . . . until he went to Court and was charged with an offense. Those statements by [the detective] did not accurately reflect [respondent's] right to legal counsel. If a defendant did not have a right to counsel until he was charged, then there would be no restriction on interrogation before charges were filed. Almost all interrogations of defendants occur before charges are filed. If [the detective's] statements were true, the right of the defendant to legal counsel will be without any meaning.

Because the district court determined that interrogation of respondent should have ceased

when he stated that he could not afford to hire an attorney, the court held that the second and third interrogations were "tainted" because they "cannot be separated" from the first statement.

**D E C I S I O N**

"[W]hen reviewing a pre-trial order suppressing evidence where the facts are not in dispute and the trial court's decision is a question of law, the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). But the district court's underlying factual findings are subject to a clearly erroneous standard of review. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

**I.**

Appellant argues that the district court's complete suppression of all statements in this homicide case has a critical impact on its successful prosecution of respondent. Minn. R. Crim. P. 28.04, subd. 1(1), provides the state with 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. Critical impact is a threshold issue and a demanding standard, and in its absence, we will not review a pretrial order. *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). The state can show that excluded evidence has a critical impact "not only when excluding the evidence completely destroys the state's case, but also when excluding the evidence significantly reduces the likelihood of successful prosecution." *Id.* (quotation omitted).

Generally, suppression of a defendant's confession will have a critical impact on the prosecution of the case. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998); *see also State v. Ronnebaum*, 449 N.W.2d 722, 724 (Minn. 1990) (holding that suppressed confession in child sex-abuse case had critical impact on prosecution); *State v. Anderson*, 396 N.W.2d 564, 565 (Minn. 1986) (holding that suppressed confession in sexual-conduct prosecution had critical impact on prosecution).

Here, at the pretrial hearing, the prosecutor explained that the suppression had a critical impact on the prosecution of this case because: (1) the two eyewitnesses to the crime were extremely intoxicated to the point of passing out; (2) the eyewitnesses gave multiple inconsistent statements and do not recall witnessing the crime; (3) it cannot be proven that the man in the hotel surveillance video is respondent; (4) causation cannot be established on this record due to lack of direct and physical evidence; and (5) "jailhouse snitches" may testify that respondent made statements to them that rebut his self-defense claim, but their credibility is at issue. Additionally, without respondent's statements, the likelihood that appellant will be able to prove that he intended to commit the underlying felonies of robbery and third-degree assault, which are specific-intent crimes, will be greatly reduced. *See* Minn. Stat. §§ 609.24 (2006) (robbery); 609.223, subd. 1 (2006) (third-degree assault); 609.02, subd. 10 (2006) (defining "assault"). Without respondent's confession, the state will be unable to prove that he intended to commit first-degree aggravated assault against one of the victims, which is also a specific-intent crime. *See* Minn. Stat. § 609.221, subd. 1 (2006).

On this record, appellant has shown that without respondent's confession, the likelihood of a successful prosecution has been significantly reduced. *See McLeod*, 705 N.W.2d at 785 (finding critical impact where "state's case appears to rest primarily on whether the jury believes" the victim).

**II.**

The right to have counsel present during all custodial interrogations is undisputed and necessary to protect the suspect's right to remain silent. *State v. Ray*, 659 N.W.2d 736, 741 (Minn. 2003). This court defers "to a district court's factual determination of whether a defendant invokes the right to counsel during an interrogation unless that determination is clearly erroneous." *State v. Bradford*, 618 N.W.2d 782, 796 (Minn. 2000).

Here, the district court found that respondent "clearly stated that he could not afford an attorney, which is an implication that [he] wanted an attorney." We defer to the district court's factual determination. Its finding that respondent equivocally invoked his right to counsel is not clearly erroneous.

Custodial interrogation that persists after the defendant's invocation of his right to counsel "violates an accused's fifth amendment right, and any statement or confession ensuing as a result of that interrogation may not be introduced in evidence at the trial of the accused." *State v. Robinson*, 427 N.W.2d, 217, 222 (Minn. 1988). The district court's decision to suppress all of respondent's statements was not clearly erroneous because the detective proceeded to elicit statements after respondent invoked his right to counsel.

It is appellant's contention that, even if respondent equivocally requested counsel, the detective's follow-up questions were proper in order to clarify respondent's request, and respondent subsequently waived his right to counsel by initiating further conversation. *See State v. Risk*, 598 N.W.2d 642, 650 (Minn. 1999) ("[W]hen an accused makes an ambiguous or equivocal statement that can reasonably be interpreted as a request for counsel, the police must stop all questioning at that time except for narrow questions designed to clarify the accused's intentions."); *State v. Hannon*, 636 N.W.2d 796, 806 (Minn. 2001) (stating that, once suspect invokes right to counsel, responses to further questioning are admissible only if suspect initiated further discussions with police and knowingly and intelligently waived right to counsel). Here, the district court held that respondent "did not voluntarily waive his right to counsel" during either interrogation. This finding is not clearly erroneous, and the detective went further than clarifying respondent's equivocal request for counsel when he continued interrogation.

Appellant claims that, even if respondent's statements are not admissible as substantial evidence, they should be available for impeachment purposes if respondent testifies at trial. The district court ordered: "Such statements shall not be used in the prosecution of [respondent]." The district court erred as a matter of law. Respondent's statements are admissible for impeachment purposes because they were voluntarily given. *See State v. Slowinski*, 450 N.W.2d 107, 111 (Minn. 1990) ("A confession obtained in violation of defendant's constitutional right to counsel may be used for the purposes of impeachment, but only if voluntary."). The district court did not clearly err when it found:

> It is also clear that many of the 'coercive' circumstances of an interrogation were not present. [The detective] was dressed in a business suit, he was not in possession of a firearm, and he did not threaten [respondent] or make any promises to [respondent]. [Respondent] was allowed to call his mother on three occasions and he was allowed to visit with his girlfriend. [Respondent] was provided with liquid refreshment and he declined an offer to use the bathroom or to get something to eat.

*See State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991) (stating that reviewing courts must examine totality of circumstances and factors such as suspect's age, maturity, intelligence, education, and experience with criminal justice system, length of interrogation, denial of physical needs, access to friends and family, and coerciveness when determining voluntariness of statement).

**III.**

Appellant moves this court to correct the transcript of respondent's first statement. Counsel for appellant claims that she reviewed the videotape and requests that the following changes be made to the transcript:

> Q: Do you want a lawyer?
> A: ~~(Inaudible).~~ **Cause that's . . .**
> Q: No not right now. Not right now. If you want a lawyer . . .~~while in~~ **we'll end** questioning.

The Minnesota Rules of Civil Appellate Procedure govern appellate procedures in criminal matter. Minn. R. Crim. P. 28.01, subd. 2. Minn. R. Civ. App. P. 110.05 provides:

> If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and determined by the trial court and the record made to conform. If anything material to either party is omitted from the record by error or accident or is misstated in it, the parties by stipulation, or the trial court, either before or after the record is transmitted to the appellate court, or the appellate court,

> on motion by a party or on its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be approved and transmitted. All other questions as to the form and content of the record shall be presented to the appellate court.

Appellant can point to no authority requiring this court to correct a transcript when the original video is also part of the record. Therefore, there is no need to correct the transcript, and appellant's motion to correct the record is denied.

**Affirmed in part and reversed in part; motion denied.**