

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1372**

State of Minnesota,
Appellant,

vs.

Mary Elizabeth Dunn,
Respondent.

**Filed February 20, 2018
Affirmed
Rodenberg, Judge**

Ramsey County District Court
File No. 62SU-CR-17-675

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

Robb L. Olson, White Bear Lake City Prosecutor, Heather Monnens, Assistant City
Prosecutor, GDO Law, White Bear Lake, Minnesota (for appellant)

Hillary B. Parsons, Allan Caplan, Caplan & Tamburino Law Firm, P.A., Minneapolis,
Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and
Smith, Tracy M., Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

The state appeals from the district court's order granting respondent Mary Elizabeth
Dunn's motion to suppress evidence in this driving while impaired (DWI) prosecution,

based on the district court's finding that the consent given to enter respondent's residence was involuntary. We affirm.

FACTS

On March 4, 2017, White Bear Lake police officer Isaac Tuma was dispatched in response to a 911 call regarding a possibly intoxicated driver. The caller, N.R., had followed the suspect, who was driving a black Mercedes, as she drove away from a dry-cleaning business. Officer Tuma testified that the dispatcher relayed to him N.R.'s information about the location of the black Mercedes as N.R. followed it until the Mercedes pulled into the driveway of a residence.

Officer Tuma met with and interviewed N.R. in a church parking lot. The interview was recorded. At the beginning of the interview, N.R. stated that he has helped catch drunk drivers in the past and that this was his sixth time calling the police about a drunk driver. N.R. explained that he was at the dry cleaners when he saw a "red-haired elderly woman get out of the Mercedes and hold herself up on the car as she walked from the driver's door around the back of the car to the passenger door." He further stated that the woman leaned on her car and the building for support. She said "oh my leg's not working" as she wobbled through the door. N.R. told Officer Tuma that he waited for the woman to leave the dry cleaners so that he could follow her car. According to N.R., he followed the woman's car and noticed that she was having trouble staying in her own lane and made a "very wide turn." Officer Tuma testified that he believed the described driving behavior was consistent with the driver being under the influence of alcohol. N.R. confirmed to the officer that he continued following the woman's car until it pulled into a driveway. Near

the end of the interview, Officer Tuma told N.R. that “we have your statement so no matter what we can test her.” On cross-examination at the omnibus hearing, Officer Tuma said that he made the statement to pander to N.R., tell N.R. what he wanted to hear, and build N.R.’s confidence.

Dispatch gave Officer Tuma respondent’s driver’s license information as the registered owner of the Mercedes. The photograph associated with the license matched the description of the driver N.R. had provided. Officer Tuma testified that, after hearing N.R.’s description of respondent’s behavior, he was concerned that the driver may have been intoxicated or having some medical issues. Officer Tuma explained that he has responded to calls of suspected drunk drivers in the past that turned out to be medical emergencies, and mentioned one case in which he responded to an accident where it turned out that the driver was having a diabetic reaction. He testified that he went to respondent’s house to conduct a welfare check. When Officer Tuma and a second officer arrived at respondent’s house, her husband, G.C., answered the door. Officer Tuma, wearing his police uniform and arriving in a fully marked squad car, identified himself as a police officer. He testified that he did not bring a PBT with him when he went to the door.

Officer Tuma told G.C. that someone had called the police because they were worried about respondent’s welfare after she was seen using her vehicle to hold herself up. G.C. said that respondent was probably holding herself up because of her back issues, but that she was in the bedroom and was doing fine. Officer Tuma testified that he wanted to personally see respondent to make sure that things were okay. G.C. invited the officer inside and said that he would go get respondent. According to Officer Tuma, G.C. was

gone for longer than he expected and returned alone, but said that respondent was coming. Eventually, respondent, whom Officer Tuma recognized from her driver's license picture, entered the room. Officer Tuma noticed that respondent was having difficulty walking, which he testified that he thought might have been due to her back problem. However, Officer Tuma said that when respondent reached the couch, she tried using her hand for support as she sat down but missed the couch, which left her leaning in an awkward position such that Officer Tuma and G.C. moved to assist her. After assisting respondent, Officer Tuma began asking respondent questions about whether she had consumed any alcohol or medications. As respondent answered, Officer Tuma smelled alcohol on her breath. Officer Tuma testified that based on the smell of alcohol, respondent's lack of balance, and her slurred speech and red eyes, he believed that she was under the influence of alcohol. At that point—after smelling the alcohol—Officer Tuma testified that his purpose switched from conducting a welfare check to investigating a DWI. He later arrested respondent and obtained a breath sample that showed a 0.25 alcohol concentration.

G.C., a retired physician and intellectual-property attorney, also testified at the omnibus hearing. He testified that Officer Tuma told him that his purpose was to conduct a welfare check on respondent based on a report that respondent was having difficulty walking. G.C. stated that he told Officer Tuma that respondent had a back condition, and that respondent came home and put laundry away, then went to bed and was fine apart from her back issues. According to G.C., Officer Tuma was “persistent in explaining that he really needed to satisfy himself that [respondent] was, in fact, fine.” G.C. testified that he felt like he had no choice but to let Officer Tuma see respondent and that he did not think

it mattered whether he said that respondent was fine or not. He felt “forced into acquiescing to [the officers’] demands that they physically see her.” G.C. testified that if he had known that Officer Tuma was investigating a DWI, he would not have let the officers inside without a warrant. G.C. explained that, while he was an attorney, he did not know how welfare checks fit into Fourth-Amendment law. He practiced intellectual-property law and did not know whether he could insist on a warrant.

Respondent was charged with two counts of second-degree DWI. Respondent moved to suppress the evidence obtained after the officers entered her house, arguing that G.C.’s consent to the entry was not voluntary because Officer Tuma misrepresented the purpose for which he sought entry. The district court granted respondent’s motion to suppress all of the evidence obtained by the officer following his entry into respondent’s home. Although the district court did not expressly dismiss the complaint, the state contends, and respondent does not dispute, that the district court’s suppression order renders the state without sufficient evidence to prove the charged offense.

This appeal followed.

D E C I S I O N

The state “may appeal as of right” to this court “in any case, from any pretrial order.” Minn. R. Crim P. 28.04, subd. 1(1). “When the state appeals from a pretrial order dismissing a criminal charge, this court will reverse only if the state clearly and unequivocally demonstrates that the district court erred and that the error, unless reversed, will have a critical impact on the outcome of the prosecution.” *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009) (quotation omitted). “Critical impact is a threshold

showing that must be made in order for an appellate court to have jurisdiction.” *Id.* (citing *State v. Kim*, 398 N.W.2d 544, 550 (Minn. 1987)). The critical-impact test is satisfied when the district court’s order “bars further prosecution of a defendant.” *Gradishar*, 765 N.W.2d at 902. The parties agree that the district court’s order suppressing the evidence effectively bars further prosecution and has a critical impact on this case. Without the evidence obtained by Officer Tuma, the state would doubtless have insufficient evidence on which to convict.

We therefore turn to the merits of the state’s appeal. In reviewing a pretrial order suppressing evidence, “we 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. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012) (quoting *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999)). “We review the district court’s findings of fact under a clearly erroneous standard, but we review its legal determinations de novo.” *Klamar*, 823 N.W.2d at 691. We defer to the district court’s credibility determinations. *Id.*

The state argues that the district court erred in concluding that G.C.’s consent to Officer Tuma’s entry was involuntary. “The question of whether consent is voluntary is a question of fact, and is based on all relevant circumstances.” *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047-48 (1973)). We will not reverse a district court’s finding concerning the voluntariness of consent unless it is clearly erroneous. *State v. Hummel*, 483 N.W.2d 68, 73 (Minn. 1992). “Because the trial court is obviously in the better position to assess the credibility of the witnesses, the state on appeal must show clearly and unequivocally that

the trial court erred in finding that consent was involuntary.” *State v. Schweich*, 414 N.W.2d 227, 230 (Minn. App. 1987).

In order to be voluntary, consent must be given without coercion and must not be a mere submission to an assertion of authority. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). Voluntariness is determined by examining “the totality of the circumstances, including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said.” *Id.* “[I]f under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats or force, or granted only in submission to a claim of lawful authority,” then the consent is invalid. *Schneckloth*, 412 U.S. at 233, 93 S. Ct. at 2051.

Officer Tuma told G.C. that he needed to enter the home to see respondent as part of a welfare check based on N.R.’s statements that respondent was having difficulties walking.¹ “Misrepresentations about the nature of an investigation may be evidence of coercion.” *State v. Bunce*, 669 N.W.2d 394, 399 (Minn. App. 2003) (quoting *United States v. Turpin*, 707 F.2d 332, 334 (8th Cir. 1983)), *review denied* (Minn. Dec. 16, 2003). If consent to search is given based on reliance upon a misrepresentation, the consent will be invalid. *Turpin*, 707 F.2d at 335. While a ‘tacit misrepresentation’ about the purpose of

¹ “Under the ‘emergency exception’ to the warrant requirement police are allowed to make a warrantless entry and search of a home when they reasonably believe that a person is in need of immediate aid.” *State v. Halla-Poe*, 468 N.W.2d 570, 572 (Minn. App. 1991) (quoting *Mincey v. Arizona*, 437 U.S. 385, 392, 98 S. Ct. 2408, 2413 (1978)). The state does not argue that this search was conducted under the emergency-aid exception on appeal; rather, the state relies only on G.C.’s consent as having authorized the warrantless entry into the home.

the search “may even rise to such a level of deception so as to invalidate a search[,] . . . an officer’s failure to tell a defendant that he is suspected of a crime does not invalidate the defendant’s consent to search the house.” *Bunce*, 669 N.W.2d at 399 (citation omitted). We have “emphasize[d] police do not have authority, simply by using the term ‘welfare check,’ to vitiate the protections of the [F]ourth [A]mendment.” *Halla-Poe*, 468 N.W.2d at 573.

The district court found that Officer Tuma “gained entry to the home under false pretenses,” and that telling G.C. that he was there for a welfare check was a “misrepresentation” that “rose to such a level of deception as to invalidate” G.C.’s consent. G.C. initially denied the officer entry. The district court found that it was only after the “misrepresentation” that G.C. allowed Officer Tuma to enter the home, and see and visit with respondent. The district court implicitly found that the officer did not actually have the purpose to do a welfare check and, instead, intentionally misidentified that as his purpose to obtain G.C.’s consent to enter the home and continue the DWI investigation.

The state argues that Officer Tuma’s purposes were several, including both a DWI investigation and a welfare check. It argues that the latter was a valid purpose for which Officer Tuma could request entry to the residence, and that Officer Tuma was not required to disclose any criminal investigation or any other purpose for which he sought entry. The testimony that Officer Tuma left his PBT in his squad car and has had experiences where calls for suspected drunk drivers have turned out to be medical emergencies lends some support to the state’s argument that Officer Tuma wanted to conduct a welfare check.

The district court found that Officer Tuma told G.C. only that he wanted to conduct a welfare check and made no mention of any belief that respondent may have been driving while impaired. The district court implicitly rejected the contention that Officer Tuma was conducting a welfare check. During his discussion with N.R., Officer Tuma expressed no concern about respondent's health. N.R. expressed no belief or concern that respondent was ill or injured; he thought she was drunk. At the conclusion of the interview, Officer Tuma told N.R. that "no matter what we can test her." In concluding that "Officer Tuma was investigating a DWI," the district court implicitly made a credibility determination rejecting Officer Tuma's multiple-purpose claim concerning his request to enter respondent's home. "Because the trial court is obviously in the better position to assess the credibility of the witnesses, the state on appeal must show clearly and unequivocally that the trial court erred in finding that consent was involuntary." *Schweich*, 414 N.W.2d at 230. We apply this standard of review, and view the record evidence as a whole. The district court did not clearly and unequivocally err in finding that Officer Tuma misrepresented the purpose for which he sought entry.

Supporting the district court's finding is Officer Tuma's testimony that he did not plan to leave the residence without seeing respondent. He was determined to see and visit with respondent despite G.C.'s assurances that she was not ill or injured. G.C. confirmed Officer Tuma's testimony on this issue, testifying that the officer was "persistent" in stating that he needed to see respondent and did not seem willing to leave. G.C. testified that he felt "forced into acquiescing" to Officer Tuma's demands to see respondent. The district court credited G.C.'s testimony that he would not have allowed entry without a warrant if

he had known that Officer Tuma was investigating a DWI. On this record, the district court did not clearly err in finding that G.C.'s consent was merely a "submission to a claim of lawful authority," and therefore involuntary. *Schneckloth*, 412 U.S. at 233, 93 S. Ct. at 2051.

This case does not require, as the state argues, a new rule of law that officers must warn every person they encounter of all of the possible purposes for requesting entry into a home. As set forth above, "the question of whether consent is voluntary is a question of fact, and is based on all relevant circumstances" of the particular case. *Othoudt*, 482 N.W.2d at 222. On this record, the district court did not clearly err in finding that G.C.'s consent to Officer Tuma's entry was involuntary based on the district court's factual findings of a "misrepresentation" and "deception" by the officer in extracting consent to enter respondent's home.

Affirmed.