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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1554**

State of Minnesota,
Appellant,

vs.

Nicole Amber Klevgaard,
Respondent.

**Filed May 15, 2023
Affirmed
Bratvold, Judge**

Clay County District Court
File No. 14-CR-22-1829

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Megan J. Kelly, Courtney O'Reilly, Assistant
County Attorneys, Moorhead, Minnesota (for appellant)

Melvin R. Welch, Welch Law Firm, LLC, Minneapolis, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Bratvold, Judge; and
Cochran, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this pretrial appeal, appellant State of Minnesota argues that the district court erred by granting respondent's motion to suppress her statements to a trooper as taken in violation of her constitutional rights. The state contends that the district court erred by

sustaining respondent's objection to the state's proffered evidence at the suppression hearings. Quoting *State v. Pauli*, the state urges that "the Minnesota Rules of Evidence do not apply with full force during suppression hearings." 979 N.W.2d 39, 43 (Minn. 2022). Because the district court did not err by sustaining respondent's objection, we affirm.

FACTS

The following summarizes the facts alleged by the state's complaint along with other relevant parts of the district court record. At about 1:30 p.m. on May 26, 2022, a state trooper was driving on Clay County Road 34 when he saw a car approaching at high speed. The trooper "clocked" the car going 103 mph in a 55-mph zone. He turned on his emergency lights, reversed direction, and followed the car, but it accelerated. The trooper noted the license-plate number and ended the pursuit.

The trooper went to the home of the registered car owner in Felton, where the trooper saw "the suspect vehicle in the garage and the female driver he had observed fleeing opened the front door." The trooper asked respondent Nicole Amber Klevgaard why she fled, and she replied that "she likes to go fast and that it had been on her bucket list to flee from the police." The trooper arrested Klevgaard, and the state charged her with fleeing a peace officer in a motor vehicle, in violation of Minn. Stat. § 609.487, subd. 3 (2020).

In September 2022, Klevgaard moved the district court to suppress her statements to the trooper because they were obtained in violation of her rights under the Fifth Amendment to the U.S. Constitution and *Miranda v. Arizona*, 384 U.S. 436 (1966). At the October 3, 2022 omnibus hearing, the state called no witnesses but offered two exhibits: (1) the trooper's body-camera video, which, according to the state, captured the "entire

interaction” between the trooper and Klevgaard at her home before her arrest, and (2) an incident report prepared by the arresting trooper. The prosecuting attorney called these two exhibits a “*Pauli* packet.” Klevgaard’s attorney objected, arguing that the state had the burden to show no constitutional violation occurred and asserting her constitutional right to confront witnesses by cross-examination.

In response to Klevgaard’s objection, the prosecuting attorney argued that the trooper’s testimony would “only lay foundation” by establishing that the body-camera video was his and that it was “running” when he met Klevgaard at her home. The prosecuting attorney contended that *Pauli* “allows the [district] court to accept this evidence at [a] pretrial hearing.” The district court stated it would not receive the state’s exhibits, continued the hearing, and allowed the parties to brief the issue. Neither party filed a brief.

The district court issued a written order noting that *Pauli* allows the district court to consider evidence at an omnibus hearing that the rules of evidence may otherwise preclude. The district court, however, concluded that *Pauli* does not support the state’s position that it “need not call witnesses at an omnibus hearing when the defense raises constitutional concerns.” The district court’s order set a date for the continued omnibus hearing and required the “presence and testimony” of the state’s witness.

At the continued omnibus hearing, the parties repeated their respective positions about the state’s two exhibits. The district court denied the state’s request that it receive the two exhibits into evidence, found there was “no evidence” showing Klevgaard’s

statements were not taken in violation of *Miranda*, and suppressed the statements. In response, Klevgaard suggested she would move to dismiss for lack of probable cause.

After the hearing but before any motion to dismiss, the district court issued a written order suppressing Klevgaard's statements because "no evidence was received that would refute the Defendant's constitutional challenge." The district court also denied Klevgaard's probable-cause challenge, reasoning that the "entire record" established probable cause for each of the elements of Klevgaard's fleeing charge.

The state appeals.

DECISION

I. The district court's order suppressing Klevgaard's statements will have a critical impact on the state's case.

In a pretrial appeal by the state, an appellate court will reverse only if the state can "clearly and unequivocally show both [1] that the trial court's order will have a critical impact on the state's ability to prosecute the defendant successfully and [2] that the order constituted error." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quotation omitted). "We view critical impact as a threshold issue and will not review a pretrial order absent such a showing." *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017) (quotation omitted); *see also* Minn. R. Crim. P. 28.04, subd. 2(2)(b) (requiring the state to file a critical-impact statement with its appeal of a pretrial order).

"Critical impact has been shown not only in those cases where the lack of the suppressed evidence completely destroys the state's case, but also in those cases where the lack of the suppressed evidence significantly reduces the likelihood of a successful

prosecution.” *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987). The critical-impact inquiry is a fact-dependent determination. *See State v. Sexter*, 935 N.W.2d 157, 161-62 (Minn. App. 2019) (describing critical-impact inquiry), *rev. denied* (Minn. Dec. 17, 2019).

In analyzing whether a district court’s order suppressing evidence will have critical impact, “an appellate court should first examine all the admissible evidence available to the state.” *Id.* at 161. Second, the appellate court should

examine the inherent qualities of the suppressed evidence itself, its relevance and probative force, its chronological proximity to the alleged crime, its effect in filling gaps in the evidence viewed as a whole, its quality as a perspective of events different from those otherwise available, its clarity and amount of detail and its origin.

Id. Suppressed evidence “particularly unique in nature and quality is more likely to meet the critical impact test.” *Id.* at 161-62.

The state argues that the district court’s decision to suppress Klevgaard’s statements will have a critical impact on the state’s case. We agree. Conducting the two-part inquiry described in *Sexter*, we first examine all the admissible evidence available to the state. In its brief to this court, the state failed to describe what other potentially admissible evidence may prove the fleeing charge against Klevgaard. Instead, the state argues that this case is at an early stage, and therefore, all potentially admissible evidence is not in the record.

Second, we consider the inherent quality of the suppressed statements, which are described as a confession. Minnesota courts have consistently held that suppressing a defendant’s confession significantly reduces the likelihood of a successful prosecution. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (holding suppressed confession had

critical impact even when it was not the only evidence in the record of the defendant's involvement in a drive-by shooting); *State v. Ronnebaum*, 449 N.W.2d 722, 724 (Minn. 1990) (holding suppressed confession had critical impact in prosecution for sexual abuse of a child); *State v. Miller*, 659 N.W.2d 275, 280 (Minn. App. 2003) ("If suppressed, a confession 'normally will significantly reduce the likelihood of a successful prosecution.'" (quoting *Ronnebaum*, 449 N.W.2d at 724)), *rev. denied* (Minn. Jul. 15, 2003).

Klevgaard argues that suppression of her statements lacks critical impact, contrasting her case with *Ronnebaum*, a pretrial appeal by the state after the district court suppressed a confession. The state charged Ronnebaum with sexual abuse of a child; the key evidence was the victim's complaint and Ronnebaum's confession. *Ronnebaum*, 449 N.W.2d at 723. While the state's appeal of the suppression order was pending, a defense investigator interviewed the victim, and she denied the abuse. *Id.* The supreme court held that the suppression of Ronnebaum's confession would have a critical impact on the state's case, observing that even if the state had a strong case, "that does not mean that the suppression of the confession will not significantly reduce the likelihood of a successful prosecution." *Id.* at 724.

Klevgaard contends that the state has far more evidence in her case compared with the state's case in *Ronnebaum*. But Klevgaard's case is unlike that in *Ronnebaum* because it is unclear what other admissible evidence the state has. Also, the state charged Klevgaard with fleeing a peace officer, which offense requires as an element that the defendant "knows or should reasonably know" they were fleeing a peace officer. Minn. Stat.

§ 609.487, subd. 3. Klevgaard's statements to the trooper on her doorstep go directly to her knowledge that she was fleeing a peace officer.

Finally, Klevgaard's argument does not overcome Minnesota's settled caselaw concluding that the suppression of a defendant's confession has a critical impact on the state's case. *See, e.g., Miller*, 659 N.W.2d at 280. Thus, we conclude that the district court's suppression order will have a critical impact on the state's ability to prosecute Klevgaard.

II. The district court did not err by suppressing evidence of Klevgaard's statements to the trooper.

The district court ruled that with no testimony offered by the state, "and there being no stipulation by the Defendant for their admission," it would not receive the state's two exhibits, the trooper's body-camera video and incident report. The district court granted Klevgaard's motion to suppress because "no evidence was received that would refute the Defendant's constitutional challenge." The state argues the district court erred by excluding the two exhibits because it had the discretion to receive the exhibits at a suppression hearing without a witness offering testimony about the exhibits.

"When reviewing a district court's pretrial order on a motion to suppress evidence, 'we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo.'" *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quoting *State v. Jordan*, 742 N.W.2d 149, 152 (Minn. 2007)). When the facts are undisputed, "our review is entirely de novo." *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

At a suppression hearing, the state has the burden of “establishing that the challenged evidence was obtained in accordance with the constitution,” *State v. Edstrom*, 916 N.W.2d 512, 517 (Minn. 2018), and district courts are “tasked with determining whether evidence was obtained unconstitutionally,” *Pauli*, 979 N.W.2d at 49.

Klevgaard’s challenge to the admission of her statements to the trooper included two separate constitutional issues.

First, Klevgaard argued in her motion that the trooper obtained her statements without giving her a *Miranda* warning, which is required under the Fifth Amendment to the U.S. Constitution to be given during a custodial interrogation. *State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998). If, as in Klevgaard’s case, a defendant’s statement occurs before their arrest, *Miranda* requires that the district court determine whether a reasonable person would understand they are in custody based on the totality of the circumstances and whether the statement followed interrogation. *Id.* “An ‘interrogation’ under *Miranda* refers to (1) ‘express questioning’ or ‘any words or actions on the part of the police (other than those normally attendant to arrest and custody)’ that (2) ‘the police should know are reasonably likely to elicit’ (3) ‘an incriminating response from the suspect.’” *State v. Heinonen*, 909 N.W.2d 584, 589 (Minn. 2018) (footnote omitted) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980)).

When the state offered two exhibits to meet its burden to show Klevgaard’s statements were obtained lawfully under *Miranda*, Klevgaard raised a *second* constitutional issue by objecting to the district court’s receipt of the two exhibits without

the trooper's testimony and asserting her confrontation rights.¹ The Sixth Amendment 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; *accord* Minn. Const. art. I, § 6. With limited exceptions not applicable here, the Confrontation Clause bars the admission of prior testimonial statements of an unavailable witness who was not subject to cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Whether the admission of evidence violates a defendant's rights under the Confrontation Clause is a question of law that we review de novo. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

Klevgaard's Confrontation Clause challenge requires us to determine whether the statements in the body-camera video and incident report are testimonial. We first consider the primary purpose of Klevgaard's conversation with the trooper by "objectively

¹ The state argues that a "blanket statement requesting suppression of all evidence obtained as a result of an unlawful" police action, such as that in Klevgaard's motion to suppress, would fail to provide sufficient notice to the state that the trooper's testimony was necessary to meet its burden. The state's brief to this court characterizes Klevgaard's demand to cross-examine the trooper at a pretrial hearing as a discovery "tool." The state relies on caselaw stating that notice of the legal issues to be raised at an omnibus hearing is necessary to give the opposing party "a full and fair opportunity to meet its burden." *State v. Needham*, 488 N.W.2d 294, 296-97 (Minn. 1992).

At the first omnibus hearing, the prosecuting attorney offered two exhibits in response to Klevgaard's motion and, following Klevgaard's Confrontation Clause objection, urged the district court to accept the two exhibits under *Pauli*. After this hearing, the district court issued an order stating that it required "the presence and testimony of the State's witnesses at the [continued] omnibus hearing." Further, the district court's order provided that the state needed to produce its witnesses for "cross examination by defense counsel regarding alleged constitutional violations." Based on this record, we conclude that the state had sufficient notice that the trooper's testimony was required at the continued omnibus hearing and that the state had a "full and fair opportunity to meet its burden" before the district court suppressed Klevgaard's statements.

evaluat[ing] the circumstances in which the encounter occurs and the statements and actions of the parties.” *Michigan v. Bryant*, 562 U.S. 344, 359 (2011). When a conversation’s primary purpose is to prove past events potentially relevant to future prosecution, the statements made during the conversation are testimonial. *Id.* at 356. The primary purpose of the trooper’s conversation with Klevgaard at her home was to investigate the fleeing offense. Consequently, the statements made during this conversation are testimonial. The district court correctly determined that admitting these statements without an opportunity for Klevgaard to cross-examine the trooper would violate Klevgaard’s confrontation rights.

The state contends that the district court should have followed the relaxed procedure used in probable-cause challenges and therefore should have received the state’s two exhibits without a witness. When evaluating a motion to dismiss for lack of probable cause, district courts may rely on the entire record, including reliable hearsay. Minn. R. Crim. P. 11.04, subd. 1(c); *State v. Florence*, 239 N.W.2d 892, 900 (Minn. 1976). Minnesota courts have consistently held that reliance on hearsay in this context does not violate a defendant’s confrontation rights. *E.g.*, *State v. Rud*, 359 N.W.2d 573, 577 (Minn. 1984); *Florence*, 239 N.W.2d at 901-02 (citing *Gerstein v Pugh*, 420 U.S. 103 (1975)).

We are not persuaded to extend the relaxed procedure in *Florence* to the circumstances here for two reasons. First, the supreme court has declined to extend the relaxed procedure used in *Florence* to suppression hearings, reasoning that doing so would violate a defendant’s confrontation rights. *State v. Terrell*, 283 N.W.2d 529, 531 (Minn. 1979) (“The trial court, erroneously relying on *State v. Florence*, 306 Minn. 442,

239 N.W.2d 892 (1976), which dealt with the issue of probable cause to support a complaint, ruled that [for a suppression hearing] the state could rely on the transcript without calling the witnesses.”); *State v. Grey*, 256 N.W.2d 74, 77 (Minn. 1977) (holding a defendant has a right to be present and confront witnesses at a pretrial suppression hearing).

Second, we disagree with the state’s argument that *Pauli* alters our legal analysis of Klevgaard’s Confrontation Clause challenge. Indeed, we agree with the district court that *Pauli* does not support the state’s position that “it need not call witnesses at an omnibus hearing when the defense raises constitutional concerns.”

In *Pauli*, the supreme court held that the district court did not err by considering hearsay evidence—a letter from a third party about disputed evidence—when ruling on a suppression motion. 979 N.W.2d at 50. The supreme court reasoned that the suppression motion involved preliminary fact-finding to determine the admissibility of the challenged evidence. *Id.* at 49. Because a district court is “not bound to follow the Rules of Evidence” when making these preliminary findings, the district court did not abuse its discretion by relying on hearsay to rule on the suppression motion. *Id.* at 50; *accord* Minn. R. Evid. 104(a) (“Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court In making its determination it is not bound by the rules of evidence except those with respect to privileges.”). But the supreme court also noted that district courts “can and should still exclude evidence they deem unreliable.” *Pauli*, 979 N.W.2d at 50.

Pauli does not discuss or consider a Confrontation Clause challenge to the admission of testimonial evidence. Nor did *Pauli* expressly or implicitly overrule the long line of Minnesota caselaw declining to extend the relaxed procedure used in *Florence* to suppression hearings and reasoning that doing so would violate a defendant's confrontation rights, see, e.g., *Terrell*, 283 N.W.2d at 531. And *Pauli* expressly recognizes that a district court can and should exercise its discretion to exclude evidence it considers unreliable. *Id.* In other words, *Pauli* does not require a district court to admit *all* hearsay evidence offered by the state at a suppression hearing. The district court's decision to require the trooper's testimony has ample support in caselaw. Thus, we conclude that the district court did not err by excluding the state's two exhibits and suppressing Klevgaard's statements to the trooper.

Affirmed.