

FILED: November 20, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

ANGELA MARIA ALARCON,
Defendant-Appellant.

Umatilla County Circuit Court
CFH070358

A144927

Garry L. Reynolds, Judge.

Argued and submitted on August 29, 2012.

Marc D. Brown, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Andrew M. Lavin, Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Ortega, Presiding Judge, and Haselton, Chief Judge, and Sercombe, Judge.

ORTEGA, P. J.

Affirmed.

1 ORTEGA, P. J.

2 Following a trial to the court, defendant was convicted of one count of first-
3 degree assault, ORS 163.185, three counts of fourth-degree assault, ORS 163.160, and
4 four counts of first-degree criminal mistreatment, ORS 163.205, relating to the abuse of
5 two children. She appeals, raising three assignments of error. We reject without
6 discussion defendant's second and third assignments of error, and write only to address
7 her first assignment of error. In that assignment, defendant contends that the trial court
8 erred in denying her motion to suppress evidence obtained during an interrogation
9 conducted by police detectives on a Monday, following her request on Saturday to speak
10 with an attorney. In particular, she asserts that that interrogation "violated [her] Article I,
11 section 12, right to counsel." (Boldface omitted.) We agree with defendant that the court
12 erred in admitting the evidence in question. However, we conclude that the error in this
13 case was harmless. Accordingly, we affirm.

14 The facts relating to defendant's request for counsel are undisputed.
15 Defendant was arrested on Friday, November 16, 2007, in connection with an allegation
16 that she had abused S, a young child who lived in defendant's home. After her arrest,
17 defendant was held in jail, and the prosecutor instructed jail personnel not to permit
18 defendant to contact anyone. On the same day that defendant was arrested, Oregon State
19 Police detectives Banks and Ford questioned her at the jail regarding abuse of J, another
20 young child who lived with defendant. During the questioning, Banks reminded
21 defendant of her *Miranda* rights (of which she had been advised at the time of her arrest).

1 He also informed her that she could stop the interview any time she wanted and asked her
2 if she was comfortable talking with him. During the questioning, which lasted several
3 hours, defendant made a number of incriminating statements. Among other things,
4 defendant acknowledged that she had, on a number of occasions, hit J's head on
5 something hard, such as the wall or the floor. She stated that after she did this, he had
6 become very tired and, on one occasion, he had vomited. In response to a question as to
7 how defendant had hurt J's head, defendant stated that she was "positive it was from the
8 shower" and that she had "shoved him against the wall" of the shower. Defendant also
9 stated that she had not taken J to the hospital because she "knew [she] was going to have
10 to say that [she] did it," that there were three times when she had hit J's head that were
11 more significant than others, and that she had hit his head on the faucet in the bathtub.

12 After that interview ended, defendant was held in jail over the weekend and
13 was not permitted to communicate with anyone. On Saturday, November 17, defendant
14 asked an officer at the jail "when she could call a lawyer." She was told by the officer
15 that she would get an attorney when she was arraigned. Then, on the morning of
16 Monday, November 19, while Banks was meeting with the prosecutor, jail staff informed
17 the prosecutor by phone that defendant "was requesting to call an attorney." The
18 prosecutor instructed jail staff to permit defendant to use a telephone only to call an
19 attorney. Banks, at that point, understood that defendant wanted to speak to an attorney.
20 In the meantime, the officer at the jail went back to defendant and asked her whether she
21 had an attorney whom she wanted to call. When defendant responded that she did not,

1 the officer informed her that she would get an attorney when she was arraigned.

2 Later that morning, Banks and Ford again questioned defendant. At the
3 beginning of the questioning, Banks again informed defendant of her *Miranda* rights and
4 told her that the district attorney's office had asked him to speak with her again. He did
5 not, at that point, mention defendant's question to jail staff about an attorney. During the
6 Monday interview, defendant made additional incriminating statements. In particular,
7 Banks showed defendant a picture of J's head, stated that it was "healing from an injury
8 here," and asked her what had caused it. She responded that it was "[p]robably from me
9 slamming him in the tub." She further stated that in September 2007 she had "slammed
10 his head against the edge of the tub" and that, after that incident, J had been very tired
11 and vomited and then slept all day. At the end of the interview, defendant asked Banks
12 when she could talk to a lawyer, and a brief discussion ensued concerning her earlier
13 request of jail staff. Following that discussion, which lasted several minutes, Banks
14 ended the interrogation.

15 Defendant was charged with four counts of first-degree assault as to J, four
16 counts of criminal mistreatment as to J, one count of third-degree assault as to J, one
17 count of criminal mistreatment as to S, and one count of third-degree assault as to S.
18 Before trial, defendant moved to suppress all evidence relating to the Monday, November
19 19 interrogation, asserting that she had been interrogated after she had requested an
20 attorney and without having been given an opportunity to speak to an attorney. After a
21 hearing on the motion, the court issued a written order. In its order, the court found that,

1 on Saturday between the first and second interviews, defendant had asked jail staff when
2 she could call a lawyer, and "the jail staff essentially asked 'if she had a particular lawyer
3 she wanted to call' and defendant did not. Essentially, the jail staff then told her that she
4 would get a lawyer at arraignment." The trial court concluded that defendant's "query to
5 the jail staff was equivocal and she was not stopped from calling a lawyer, it was just that
6 she did not have a lawyer to call." Under the totality of the circumstances, the court
7 concluded that defendant's statements from the second interview were not subject to
8 suppression and denied her motion.

9 Defendant waived a jury trial and was tried to the court. During the trial,
10 all of defendant's statements made to Banks during both the Friday and Monday
11 interrogations were admitted into evidence. Ultimately, defendant was convicted of first-
12 degree assault on Count 1, fourth-degree assault on Count 3, first-degree criminal
13 mistreatment on Counts 5 through 8, and fourth-degree assault on Counts 9 and 10.
14 Counts 2 and 11 (one count of first-degree assault and one count of first-degree criminal
15 mistreatment) were dismissed, and defendant was acquitted on Count 4 (assault in the
16 first degree).

17 On appeal, as noted, defendant argues that the trial court erred in denying
18 her motion to suppress the statements that she made during police questioning on
19 Monday, November 19. She asserts that she unequivocally invoked her right to counsel
20 prior to that questioning. She also asserts, in the alternative, that, if her request for
21 counsel was equivocal, police improperly failed to follow up by asking her questions to

1 clarify her intentions. The state responds that defendant made only an equivocal
2 invocation of her right to have an attorney present during questioning and that police
3 properly took the necessary steps to clarify defendant's intent. "The admissibility of a
4 defendant's statements during custodial interrogation is an issue of law," and we review
5 the trial court's determination on that issue "for legal error." *State v. Holcomb*, 213 Or
6 App 168, 173, 159 P3d 1271, *rev den*, 343 Or 224 (2007). We conclude that, even if
7 defendant's invocation was equivocal as the state asserts, police failed to adequately
8 clarify her intent. Accordingly, we conclude that the trial court erred in admitting
9 defendant's statements obtained during the Monday interrogation.

10 A defendant has a right to the assistance of counsel during a custodial
11 interrogation. *State v. Meade*, 327 Or 335, 339, 963 P2d 656 (1998). "[A] level of
12 coercion is inherent in any custodial setting and * * * a lawyer's presence at a custodial
13 interrogation is one way to ensure the right to be free from compelled self-incrimination."
14 *Id.* Thus, "when a suspect in police custody makes an unequivocal request to talk to a
15 lawyer, all police questioning must cease." *Id.*; *see also State v. Montez*, 309 Or 564,
16 572, 789 P2d 1352 (1990) ("When a suspect in custody unequivocally requests to talk to
17 a lawyer, *that request must be granted* and further questioning must cease." (Emphasis
18 added.)). However, when the request is equivocal, "the police may follow up with
19 questions intended to clarify whether the suspect meant to invoke his right to counsel."
20 *Meade*, 327 Or at 339; *see also State v. Gable*, 127 Or App 320, 329, 873 P2d 351, *rev*
21 *den*, 319 Or 274 (1994) ("If a suspect's request for counsel is equivocal, subsequent

1 interrogation must be limited to clarifying the suspect's intent.").

2 "Whether a request is an equivocal or unequivocal request for counsel
3 depends on whether a reasonable officer would have understood that the suspect was
4 invoking the right to counsel." *State v. Dahlen*, 209 Or App 110, 117, 146 P3d 359,
5 *modified on recons*, 210 Or App 362, 149 P3d 1234 (2006). "We determine whether a
6 defendant has made an unequivocal request for counsel by analyzing the request in light
7 of the totality of the circumstances to determine whether a reasonable officer in the
8 circumstances would have understood that the suspect was invoking his right to counsel."
9 *State v. Field*, 231 Or App 115, 123, 218 P3d 551 (2009) (internal quotation marks
10 omitted).

11 In *Dahlen*, we analyzed whether a defendant had made an unequivocal
12 request for counsel in circumstances similar to those presented in this case. 209 Or App
13 at 115. There, the defendant was arrested for robbery and placed in a cell. About eight
14 hours later, from the cell, he asked an officer when he would be able to call his attorney.
15 The officer with whom the defendant spoke noted in the "prisoner log" that the defendant
16 wanted to call an attorney. *Id.* at 112. The defendant later asked about an attorney a
17 second time. After that inquiry, the detective investigating the robbery interviewed the
18 defendant. He informed the defendant of his *Miranda* rights both orally and in writing,
19 and the defendant acknowledged both orally and in writing that he understood those
20 rights. The detective then questioned the defendant and obtained a confession to the
21 robbery.

1 On appeal, we considered whether the defendant's confession should have
2 been suppressed on the basis that he had made an unequivocal request for counsel when
3 he asked when he could call an attorney. We concluded that the question--"When can I
4 call an attorney?"--constituted an unequivocal request for counsel. *Id.* at 117. We
5 explained:

6 "[T]he central issue here is how defendant's use of the adverb 'when' related
7 to the rest of the sentence 'can I call my attorney.' The ordinary meaning of
8 'when' is 'at what time: * * * how soon' *Webster's Third New Int'l*
9 *Dictionary* 2602 (unabridged ed 2002). Were we to accept the state's
10 interpretation of defendant's request (that is, that '[a]t most, [defendant] was
11 asked *when* he would have an opportunity to call an attorney') we would be
12 required either to read words into the request that defendant did not utter
13 (namely, 'will I have an opportunity to') or to conclude that defendant used
14 the word 'when' out of step with its ordinary meaning. A reasonable officer
15 would interpret defendant's words consistently with their ordinary meanings
16 and would not understand the defendant to say something he did not
17 actually say."

18 *Id.* at 118 (brackets and omission in original). We further observed that "the phrase 'will
19 I have an opportunity to' may express a present desire to do something, or it may simply
20 be intended to explore one's options. It is ambiguous. 'When can I,' in contrast,
21 expresses a present desire to do the things asked about." *Id.*; *cf. State v. Charboneau*, 323
22 Or 38, 55, 913 P2d 308 (1996) (the query "Will I have an opportunity to call an attorney
23 tonight?" is equivocal). We further noted that the officer hearing the defendant's query
24 did, in fact, understand that the defendant wanted to call an attorney and that that
25 understanding was reflected in the notation in the prisoner log. Under the totality of the
26 circumstances presented, we concluded that the defendant's question amounted to an
27 unequivocal request for counsel.

1 Here, defendant's query about "when she could call a lawyer" is
2 substantially similar to the query we evaluated in *Dahlen*. Furthermore, like the officer in
3 *Dahlen*, the officer hearing defendant's query did not necessarily consider it to be
4 ambiguous; jail staff communicated to the prosecutor that defendant "was requesting to
5 call an attorney." Banks, at the suppression hearing, responded to the question whether,
6 before starting the second interview of defendant, he "pretty much had notice that she
7 wanted to speak to an attorney" by saying, "Yes, I knew that she had contacted the staff
8 about an attorney. Absolutely." Under those circumstances, an officer would have
9 reasonably understood that defendant was invoking her right to counsel, and no further
10 questioning of defendant should have occurred.

11 In any event, even if we were to conclude that defendant's question
12 constituted only an equivocal invocation of the right to counsel, officers in this case
13 failed to follow up with questions intended to clarify whether defendant meant to invoke
14 her right to counsel. *See Meade*, 327 Or at 339. The state argues that, at the beginning of
15 the Monday interrogation, Banks again advised defendant of her *Miranda* rights and that
16 she "indicated her willingness to continue answering the detectives' questions during the
17 second interview." Under the circumstances, we do not agree with the state that officers
18 sufficiently clarified defendant's intent.

19 After her arrest, defendant was held in the jail and was not permitted to
20 communicate with anyone. During the first police interview on the day of her arrest,
21 defendant was informed of her rights. The next day, defendant asked an officer when she

1 could call a lawyer. The answer that she ultimately received was that, if she did not have
2 a particular attorney whom she wanted to call, she would have to wait until her
3 arraignment to get one. Despite this question and answer, Banks initiated a second
4 interview with defendant and, at the beginning of that interview, did not mention her
5 query regarding an attorney--which he had been told was a request to call an attorney--
6 but instead only advised defendant again of her *Miranda* rights. Given that, by then,
7 defendant had been informed by an officer that she would get a lawyer when she was
8 arraigned (or, in other words, that if she did not have an attorney to call, she would not
9 get one until arraignment), merely informing her of the same rights that she had been
10 informed of before her query regarding an attorney was not sufficient to clarify her intent.
11 Under all the circumstances, the evidence obtained from the Monday interrogation should
12 have been suppressed.

13 We turn next to the issue of whether the error in admitting the evidence
14 from the second interview requires reversal of defendant's convictions relating to J's head
15 injuries.¹ We will affirm a judgment of conviction notwithstanding the erroneous
16 admission of evidence if there is little likelihood that the admission of the evidence
17 affected the verdict. *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003).

¹ Defendant and the state agree that, in any event, the admission of the evidence from the second interview was not harmful with respect to defendant's convictions on Counts 3 and 7 to 10, which did not relate to J's head injuries. Only Counts 1, 5, and 6 related to those injuries: Count 1 charged that defendant intentionally caused serious physical injury--"head injury"--to J, and the state "elected 'skull fracture' and 'brain injury' as its theories for Counts 5 and 6," which charged defendant with knowingly withholding necessary physical care and medical attention from J.

1 "In determining whether the error affected the verdict, it is necessary that
2 we review the record. However, in so doing, we do not determine, as a
3 factfinder, whether the defendant is guilty. That inquiry would invite this
4 court to engage improperly in weighing the evidence and, essentially,
5 retrying the case, while disregarding the error committed at trial, to
6 determine whether the defendant is guilty."

7 *Id.* Instead, in determining whether there is little likelihood that the admission of the
8 evidence affected the verdict, we consider "the nature of the erroneously admitted
9 evidence in the context of other evidence on the same issue." *State v. Maiden*, 222 Or
10 App 9, 13, 191 P3d 803 (2008), *rev den*, 345 Or 618 (2009). As part of that
11 consideration, we assess "any differences between the quality of the erroneously admitted
12 evidence and other evidence admitted on the same issue." *Id.*; *see also Davis*, 336 Or at
13 33-34 (evaluating whether the finder of fact would have considered evidence duplicative,
14 cumulative, or unhelpful). We also consider whether the evidence in question relates to a
15 central factual issue in the case, as opposed to a tangential issue. *Maiden*, 222 Or App at
16 13; *State v. Roller*, 201 Or App 166, 173, 118 P3d 804 (2005).

17 Here, complete transcripts and audio recordings of both of defendant's
18 interviews with police were admitted at trial. The state contends that, even if "the trial
19 court erroneously denied defendant's motion to suppress, that error was harmless."

20 (Boldface omitted.) In particular, the state points out that.

21 "[i]n both interviews, defendant confessed to slamming [J]'s head up
22 against hard objects. Each of defendant's confessions was in response to
23 the detectives asking her about [J]'s specific head injuries. During each
24 interview, defendant provided a timeframe for the assaults and described
25 [J]'s physical reactions to them. Therefore, defendant's statement during the
26 second interview was no more incriminating than her statements during the
27 first interview."

1 Defendant "acknowledges that many of the statements made by her in the
2 Monday interrogation were also made in the Friday interrogation." However, she asserts
3 that one statement from the second interview "was particularly harmful and had no
4 counterpart" from the earlier questioning. In particular, she asserts that admission of her
5 statement from the Monday interrogation that she "probably" caused the injury to J's head
6 when she slammed his head on the edge of a bathtub in September was harmful because,
7 although she had previously acknowledged hitting J's head against a wall, "her statements
8 on Monday were substantially more harmful" because she was shown a picture and
9 "specifically confessed."

10 We agree with the state that, given the nature and extent of defendant's
11 confessions during the first interview, there is little likelihood that the admission of
12 defendant's statements from the second interview affected the verdict. Although the
13 evidence in question related to central factual issues in the case--the abuse of J--it was not
14 significantly different than the evidence on the same issue obtained from the Friday
15 interview.

16 By the end of the Friday interview (and, therefore, before her query
17 regarding an attorney on Saturday), as relevant to this assignment of error, defendant had
18 confessed to slamming both the back and sides of J's head onto hard surfaces, including
19 floors, walls, the shower, and a faucet, on numerous occasions. She had admitted that
20 several times when this happened, she had noticed a significant difference in J's
21 demeanor--that he became very tired--and that she had been concerned, but had not

1 sought medical attention for J because she had not wanted her actions discovered. She
2 also had observed that, on one occasion, when she had slammed J's head, he had vomited.
3 Finally, she had confessed that she was "positive" that the injury to J's head occurred
4 from her hitting it on the shower.

5 Again, the only evidence from the Monday interview that defendant asserts
6 is harmful and different from what had been obtained in the first interview was her
7 "confession" to causing injury to J's head on the edge of the tub. Banks showed
8 defendant a picture of J's head and asked her whether she knew what had caused J's
9 injury.

10 "[Defendant]: Probably from me slamming him in the tub.

11 "Q Do you know--I mean, do you remember if he had an injury
12 that was here in this area?

13 "A I didn't notice it.

14 "Q When you slammed--any time--any of the times that you
15 slammed him, did ever this part of his head strike something?

16 "A Yeah, like the edge of the tub.

17 "Q The edge of the tub. And how long ago was that?

18 "A September.

19 "Q September of this year?

20 "A Yeah.

21 "Q '07. And that was slammed his head against the edge of the
22 tub?

23 "A Yeah.

1 "Q What happened to him after that?

2 "A He was tired. He was really tired. And I got him up and I got
3 him dressed and I told him to go and go and find something to do, that he
4 couldn't be in his room, and then he was standing by the dining room and
5 he threw up, like everywhere, everywhere. He just like threw up. And he
6 said he was really, really tired. He slept, like, all day."

7 She also stated that she did not seek medical attention for J because "he had bruises on
8 his [buttocks]."

9 Although defendant asserts that that evidence was particularly damaging
10 because it was more specific than her statements from the first interview and because it
11 was a "specific confession" to one of the charges, we disagree. First, we observe that
12 defendant made very similar statements during the first interview regarding J's head
13 injury. One of the detectives asked defendant, during the Friday interview, what had
14 happened to J's head, and defendant stated that she was "positive it was from the shower."
15 She further described hitting J's head on hard surfaces:

16 "Q How many times do you think that you pushed his head into
17 something hard?

18 "A About four or five times.

19 "Q Did you notice any significant difference in his demeanor
20 after that?

21 "A He was just really tired, like really tired.

22 "Q Did he get sick, vomit?

23 "A He would just be, like, out. He vomited one time. One time
24 he puked everywhere. And then I said, Are you okay? And he said, I'm
25 just tired. He said, I'm tired, Mom. And I said, Okay. And I got scared
26 and I didn't want to take him to the hospital because I knew, like I knew
27 that I was going to have to say that I did it. * * *

1 "* * * * *

2 "Q How many times did that happen like that?

3 "A At least four times.

4 "Q At least four times that he got--Were any of them to the back
5 of the head?

6 "A Yeah.

7 "Q How many of those?

8 "A Two.

9 "Q Were any to the front of the head?

10 "A No.

11 "Q Any to the side?

12 "A Side.

13 "Q Was it the left side or the right side?

14 "A Both."

15 Later during the first interview, Banks asked defendant again about injuries to J's head:

16 "Q Okay, when you hit his head, you said there was about four
17 times where you hit his head?

18 "A Maybe more.

19 "Q Maybe more. Was there some that were more significant than
20 others, that worried you more? How many that really worried you?

21 "A Probably three of them.

22 "Q Probably three of them?

23 "A Really, really worried me.

1 "Q And what did you hit his head with?

2 "A Just the wall or the floor. I wouldn't hit him with objects. I
3 would just grab him and just slam him, or I would grab him, and if he was,
4 like, acting like he was going to fall, I would do that.

5 "Q Was there ever like a corner of the tub, was there ever like a
6 faucet?

7 "A There was a faucet.

8 "Q Was that where?

9 "A In the tub."

10 In view of the nature and extent of defendant's confession during the Friday
11 interview, it is extremely unlikely that any additional detail that Banks elicited during the
12 Monday interview made any difference to the verdict in this case. Comparing
13 defendant's statements from the Monday interview with those from the earlier
14 questioning, they appear, for the most part, to be the same. Indeed, as the state points
15 out, defendant's statements from the first interview may be even more damaging than the
16 exchange she points to from the later questioning. In both interviews, defendant admitted
17 to slamming J's head, that he became very tired after she did so, and that on one occasion
18 he vomited "everywhere." In the first interview defendant stated that she was "positive"
19 that the injury came from the shower and that she had hit J's head against a faucet in the
20 tub. In the second interview she said that the injury was "probably" from when she
21 slammed J in the tub and stated that, once, in September, his head had hit the edge of the
22 tub. Those admissions regarding the injuries to J's head are similar, and any differences
23 between them are insignificant.

1 We further note that, during the trial, defendant attempted to raise questions
2 regarding how J's head was injured and, although the state referenced defendant's
3 statements during both interviews, it emphasized her statement during the first interview
4 that she was "positive" that J's injury came from her slamming his head in the shower.
5 While cross-examining defendant during the trial, the prosecutor brought up that
6 statement on more than one occasion, and defendant agreed that she had made that
7 statement to the detectives.

8 To summarize, we conclude that the differences between the erroneously
9 admitted evidence from the second interview and the other, properly admitted evidence
10 from the first interview are insignificant. Given the nature and scope of defendant's
11 admissions during the Friday interrogation, there is little likelihood that the admission of
12 the evidence of defendant's statements from the Monday interrogation affected the verdict
13 in this case.

14 Affirmed.