DIVISION ONE
FILED: 06/28/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0272
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
BYRON DEAN FERGUSON,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. V1300CR820080409

The Honorable Warren R. Darrow, Judge

REVERSED AND REMANDED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

John David Napper — Prescott
Attorney for Appellant

S W A N N, Judge

¶1 Byron Dean Ferguson ("Defendant") appeals from his convictions on six counts of sexual exploitation of a minor, each a class 2 felony and dangerous crime against children. He

contends that (1) the trial court abused its discretion when it denied his motion to suppress, and (2) the state committed prosecutorial misconduct when it referred to Defendant as a pedophile in its rebuttal closing argument. For reasons set forth below, we reverse and remand.

FACTS[1] AND PROCEDURAL HISTORY

¶2 On June 11, 2008, as a result of an interview with a nine-year-old boy[2], Yavapai County Sheriff's Office Detectives Pam Edgerton and Shonna Willingham executed a search warrant on Defendant's residence, a converted school bus located on property belonging to the Verde Hay Market. The search involved the bus as well as a 1987 gold/brown Chrysler New Yorker.

¶3 During the search of the bus, Edgerton found a large box full of floppy disks[3] containing numerous images of child pornography[4]. Written on the side of the box were the words

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[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against the defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

[2] The charges involving the juvenile were eventually severed from the charges involved in this case and tried separately prior to the trial here. A jury found Defendant guilty of kidnapping and attempted child molestation, and those convictions were the subject of a prior appeal in *State v. Ferguson*, 1 CA-CR 10-0103.

[3] Edgerton estimated the box contained approximately 238 individual floppy disks and approximately 20-25 CDs.

[4] At trial, Defendant stipulated that the images contained child pornography involving children under the age of fifteen.

"Blue," "Tapes," and "Computer." "Blue" is the nickname of Defendant's identical twin brother, Bryan,[5] who lived with Defendant for seven years before moving to Ohio in 2006. Edgerton eventually extracted 5,700 images from the disks and sent them to the National Institute for Missing and Exploited Children, which identified approximately 160 of the children in the images by name and date of birth.

¶4 During a search of the Chrysler, Willingham located in the trunk two blue binders, one of which contained several printed photographs depicting child pornography. The binder also contained copies of e-mail exchanges between "bdeanf" and other parties as well as an envelope labeled "Dean Ferguson."

¶5 Defendant was interviewed twice by Edgerton on the day the search was executed: once, for three minutes, while he sat in the back of a patrol car at the scene; the second time, about two hours later, in an interview room at the Yavapai County Sheriff's Office. Edgerton read Defendant his *Miranda*[6] rights before speaking with him in the patrol car, and reviewed those rights before speaking with him again at the Sheriff's Office. During the second interview, Defendant told Edgerton that the

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[5] At trial, Edgerton testified that Bryan had been arrested in Ohio and was in prison there, after having pled guilty to possession of child pornography, an offense similar to the ones at issue here.

[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Chrysler and all of the items inside it were his, that "bdeanf" was his e-mail address and that no one else had access to his e-mail account. Defendant also told her that his brother had some property, "a couple of trunks," left in the bus.

¶6 Initially the interview concerned the allegations made by the nine-year-old boy, but Edgerton's questioning then turned to the child pornography. When Edgerton informed Defendant that they had found a binder in the car that contained photographs of naked boys, Defendant responded, "[M]y computer binder?" Thereafter, in response to a question regarding whether any of the materials in the car might belong to Blue, Defendant replied that it "could well be" that some of it belonged to his brother and that it "[a]ll came out of storage." After Edgerton mentioned that some papers containing his e-mail address were also found among the photographs in the blue binder, Defendant also speculated that his ex-girlfriend might have had access to his e-mail account. Defendant denied any knowledge of the photographs that were in the blue binder found in the car and of the pornographic images contained on the floppy disks in the box found on the bus. Defendant also denied that either he or his brother had any sexual interest in children or small boys.

¶7 The state charged Defendant with ten counts of sexual exploitation of a minor, each a class 2 felony and dangerous crime against children. These counts were renumbered Counts 1

through 10 for trial. Counts 1-4 involved the images contained on floppy disks found in the box on the bus, and Counts 5-10 involved the photographs found in the blue binder in the trunk of the vehicle. Evidence of Defendant's prior convictions for kidnapping and attempted child molestation, rendered in the previous trial on the severed counts, was admitted into evidence at trial pursuant to Ariz. R. Evid. 404(c).

¶8 Defendant testified at trial. He did not contest the fact that he "possessed" either the box with Blue's name on it or the blue binder insofar as these were found on his bus or in the car. Nor did Defendant contest the fact that the images contained on the disks or in the photographs constituted child pornography. His only contention was that the state had no proof that he knowingly possessed the child pornography found.

¶9 Defendant maintained that he had no knowledge of either the contents of the floppy disks in the box or of the presence of the photographs in the blue binder. He testified that he had moved boxes containing Blue's property after Blue left for Ohio, but that he had never gone through them because the majority were sealed or were Blue's personal property. He specifically testified that he had never gone through the box with the floppy disks at issue. Defendant acknowledged that he used the Chrysler to move some of his or Blue's property but testified that he had never put the blue binders in the trunk

and did not recall seeing them there. He maintained that he was "moving so much stuff" that he "wouldn't remember" them, but also that he specifically never recalled "seeing them or touching them" and had never looked inside them. He also testified that until this evidence was unearthed, he had had no previous knowledge that his brother was interested in child pornography.

¶10 At the conclusion of the trial, the jury acquitted Defendant of the four offenses involving the pornography on the disks, but found him guilty of the six offenses involving the pornographic photographs contained in the blue binder. On March 15, 2010, the trial court sentenced Defendant to mitigated sentences of 21 years (flat time) in prison on each of the six offenses (Counts 5-10), and ordered that the sentences be served consecutively.

¶11 Defendant timely appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033.

DISCUSSION

I. Motion to Suppress/Invocation of Right to Counsel

¶12 Before trial, Defendant requested a voluntariness hearing "to determine the admissibility of any and all statements of Defendant which the State intends to use at trial." On October 20, 2009, the trial court held a hearing on Defendant's motion. Edgerton testified at the hearing. An

audio recording was played for the court of the first interview that occurred in the patrol car, when Edgerton initially read Defendant his *Miranda* rights. A copy of that tape is not contained in the record on appeal. However, Edgerton testified that she read Defendant his *Miranda* rights.

¶13 A copy of an audio recording of the second interview was made available at the hearing by defense counsel. A brief recess was taken during which the trial judge listened to the tape. Edgerton also testified about her interchange with Defendant.

¶14 At issue is the following exchange in the second interview between Edgerton and Defendant:

> Detective: Alright, I, you're still in custody. I, I read your rights earlier. You don't have to talk to me. You don't have to . . . .
>
> Defendant: Mm hmm.
>
> Detective: You can have an attorney if you want to, one can be appointed for you if you don't have one or can't afford one.
>
> Defendant: I can't.
>
> Detective: What's that?
>
> Defendant: I can't afford one.
>
> Detective: Okay.
>
> Defendant: **I'd like to have one appointed.**
>
> Detective: Okay, that's generally that happens after your initial [appearance]

> tomorrow morning, when you're initialed by the judge and the judge will give you an attorney at that time. Or he'll, you're going to fill out paperwork and stuff at the jail that'll show that you are not financially capable of hiring an attorney
> . . . .
>
> Defendant: Mm hmm.
>
> Detective: So you can do that. [silence] Um, alright. The reason we are here is because we had a report from [a woman]
> . . . .

(Emphasis added.)

¶15 Defendant maintained that he had invoked his right to an attorney when he stated, "I'd like to have one appointed." Edgerton maintained that Defendant had never asked for an attorney and that she did not interpret his statement as such a request. Instead, she interpreted his statement as simply acknowledging the fact that he could not "afford" an attorney and would need to have one appointed. She therefore responded by explaining how "that happens."

¶16 The state also pointed out that Defendant then went on to answer questions for two hours without ever requesting that the interview stop or that an attorney be present. Therefore, it was the state's position that Defendant had never made an "unequivocal" request for an attorney, including at any point in the ensuing two-hour interview.

¶17 The trial court asked for additional briefing on the issue and took the matter under advisement. On November 12, 2009, the trial court ruled that Defendant's *Miranda* rights were not violated and that his statements to Edgerton were made voluntarily[7]. It reasoned that, in "the whole context, the invocation, the possible invocation . . . is ambiguous because the focus is on the ability to afford an attorney." The trial court noted that the law does not require officers to clarify a defendant's statement where it is "ambiguous" and that Edgerton did not need to ask for further clarification before continuing her questioning. Finding "compliance with *Miranda,*" the trial court ruled that the statements were admissible in the state's case-in-chief.[8]

¶18 At a pretrial conference, Defendant renewed his motion. The court held another hearing at which Edgerton and Defendant testified. Edgerton and the state essentially

[7] Defendant conceded that the voluntariness issue concerned only the issue of invocation in the second interview.

[8] At the conclusion of Defendant's trial on the severed counts of attempted molestation and kidnapping, the trial court *sua sponte* confirmed this ruling, finding that Defendant's statement was "ambiguous" and "not a clear implication" of the *Miranda* right to an attorney. The court noted that its decision was based on Defendant's earlier conversations with law enforcement post-*Miranda* as well as the fact that Defendant did not react to Edgerton's statement that he did not have to speak with her but reacted only to the statement that an attorney would be appointed if he could not afford one. Rather than an invocation, therefore, the court concluded the statement was "really a focus on paying for a lawyer."

presented the same testimony and arguments as at the first hearing. Defendant testified that he had been drinking and sleeping when the officers arrived and maintained that he could not say whether or not he was "fully awake and aware" when Edgerton Mirandized him the first time. He also maintained that he "never" realized that he could have an attorney present and that he was "under the impression even during the second interview when [he] said [he] would like one that there was no way that [he] could get an attorney until we had the first court appearance."

¶19 After hearing argument from both sides, the trial court again confirmed its earlier rulings. The court noted that both parties agreed that Edgerton had read Defendant the *Miranda* rights at the first interview. The court further noted that it had heard, on the tape of the second interview, acknowledgement by Defendant of his rights having been provided by the "uh huh kind of things and acknowledging that he's understanding these things," including Edgerton's statement that he did not have to speak with her. The court again pointed to the fact that it was only when they "start[] talking about an attorney in the context of affording one" that Defendant mentioned an attorney. The court again concluded that Edgerton "reasonably believed" that Defendant was not saying that he "want[ed] an attorney now before I talk" but was simply "getting [Defendant's] request in"

that he wanted one appointed because he could not afford one on his own.

¶20 On appeal, Defendant argues that the trial court abused its discretion when it concluded that his statement, "I'd like one appointed," was not an unequivocal request for an attorney and permitted his subsequent statements to be admitted at trial. We agree.

¶21 In reviewing a trial court's ruling on a motion to suppress, we must determine whether clear and manifest error occurred. *State v. Newell*, 212 Ariz. 389, 396, ¶ 22, 132 P.3d 833, 840 (2006). This standard applies both to motions alleging a violation of a defendant's right to counsel under *Miranda* and to those alleging the statement was not voluntary. *Id*. at 396 n.6, ¶ 22, 132 P.3d at 840 n.6. We review the factual findings underlying the trial court's determination for an abuse of discretion but review de novo the court's legal conclusions. *Id*. at 397, ¶ 27, 132 P.3d at 841.

¶22 "A person is entitled to *Miranda* warnings before being subjected to custodial interrogation." *State v. Zinsmeyer*, 222 Ariz. 612, 618, ¶ 8, 218 P.3d 1069, 1075 (App. 2009) (citing *Miranda,* 384 U.S. at 444). The right to the presence of an attorney during questioning is one of the rights of which a person must be informed under *Miranda*. *Id.*

¶23 If a defendant being interrogated asserts his or her right to counsel, all questioning must stop "until an attorney is present or the defendant reinitiates the communication." *Newell*, 212 Ariz. at 397, ¶ 24, 132 P.3d at 841 (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *Miranda*, 384 U.S. at 474). Before an officer must stop questioning, the defendant must "unambiguously request the presence of counsel." *Newell*, 212 Ariz. at 397, ¶ 25, 132 P.3d 841 (citing *Davis v. United States*, 512 U.S. 452, 459 (1994)). That means that a defendant "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id*. (quoting *Davis*, 512 U.S. at 459). If a reasonable officer under the circumstances understands only that a defendant "might" want an attorney, then questioning need not cease. *Id*. Thus, for example, the U.S. Supreme Court has found that a statement such as "*Maybe* I should talk to a lawyer" was not an unambiguous request for a lawyer and that officers were not required to cease questioning in light of it. *Davis,* 512 U.S. at 462. Our supreme court similarly found that a defendant's statement, "I think I might want an attorney," was not an unambiguous request for counsel and that the officers' subsequent questioning was proper. *State v. Ellison*, 213 Ariz. 116, 127, ¶ 29, 140 P.3d 899, 910 (2006). And while it may be

good practice, if a statement is ambiguous, the law does not require police officers to ask for clarification. *Davis*, 512 U.S. at 461-62.

¶24 The state argues that Defendant's statement in this case "did not amount to an unequivocal or unambiguous request to have an attorney present during questioning." The state moors its assertion to the fact that, at the time Defendant made his statement, Edgerton was talking about being able to "afford" an attorney. Thus, according to the state, rather than being an unequivocal request for an attorney, Defendant's statement indicated only that he did not have the means to hire one.

¶25 According to the state, its interpretation is supported by the fact that Edgerton immediately went on to explain to Defendant the procedures for showing that he did not have the means to hire an attorney and getting one appointed for him at his initial appearance, which in Defendant's case was set to occur the following morning. The state also supports its interpretation by noting that Defendant then went on to answer Edgerton's questions for close to two hours without ever indicating that he wanted an attorney present.

¶26 If "I'd like to have one appointed" is not an unequivocal request for an attorney, as the state maintains, it is hard to imagine what would be. In *State v. Smith*, the Supreme Court reasoned that the "'flavor' of an accused's

request for counsel" may not be "dissipated" by continued police interrogation. 469 U.S. 91, 98 n.7 (1984). The Court also noted that using a defendant's subsequent responses to questioning as a means to cast doubt upon the adequacy of an unambiguous request for an attorney itself was "intolerable." *Id*. at 98.

¶27 Smith, when informed under *Miranda* that he had the right to have an attorney present with him when he was being questioned, initially stated, "Uh, yeah. I'd like to do that." 469 U.S. at 92-93. Instead of terminating questioning at that point, the officers continued to finish reading Smith his *Miranda* rights and then questioned him further about whether he wished to have an attorney appointed or wished to speak with them at that time without a lawyer present. *Id.* at 93. Under this additional questioning, Smith waivered, "yeah and no," about whether he wanted an attorney present and ultimately agreed to speak to the police without one, stating "All right. I'll talk to you then" after being told he could stop the questioning at any time. *Id.*

¶28 The lower courts in *Smith* construed Smith's request for counsel as "ambiguous" by looking at Smith's subsequent responses to police questioning and concluding that "considered in total" his statements were equivocal. 469 U.S. at 97. The Supreme Court disagreed and reversed. It reasoned that,

"[w]here nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease." *Id.* at 98. We find this reasoning applicable in the present case.

¶29 *Miranda* warnings are a litany of cautions that advise individuals of their rights, including the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed if they cannot afford to hire one on their own. In the present case, immediately upon being reminded that he could have an attorney appointed if he could not afford one, Defendant responded that he could not afford one and stated, "I'd like one appointed." Rather than being ambiguous, that is a clear and unequivocal request for an attorney. All questioning should have stopped at that point. The fact the Edgerton then may have gone on to explain the procedures for showing financial need and applying for an appointed attorney, or the time that such attorneys are "generally" appointed, does not render the words "I'd like one appointed," or what led up to them, ambiguous. To the contrary, upon being told he could have an attorney appointed if he could not afford one, Defendant immediately asserted that he would "like one appointed."

¶30 Nor does the fact that Defendant continued to answer questions initiated by Edgerton change our analysis. A valid

"waiver" is not established by a showing *only* that the defendant "responded to further police-initiated custodial interrogation" after making an unequivocal request. *Smith*, 469 U.S. at 98. If such a showing were sufficient, the door would be open to the "explicit or subtle, deliberate or unintentional" wearing down of defendants by the authorities and the right to counsel during questioning would lose its meaning. *Id*.

¶31 Because Defendant here made an unequivocal request for an attorney, all questioning should have stopped at that point. Because it did not, his subsequent statements to Edgerton should not have been admitted into evidence. The trial court therefore committed "clear and manifest error" when it permitted the state to introduce them at trial.

¶32 Our inquiry does not end there. We must next determine whether the error in admitting Defendant's subsequent statements to Edgerton was harmless. *State v. Eastlack*, 180 Ariz. 243, 251, 883 P.2d 999, 1007 (1994). "The inquiry on review 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.'" *Id*. The error is harmless only "if we can say beyond a reasonable doubt that the error did not contribute to or affect the jury's verdict." *Id*. Based on our review of the record, we cannot say beyond a

reasonable doubt that the error here did not contribute to or affect the jury's verdicts concerning the pornographic photographs in the blue binder.

¶33 Defendant's statements to Edgerton that relate to the binder include his statements that everything in the car was his, that he used the car to store and transport property, and that no one else had access to his e-mail account. The evidence at trial established that the binder contained copies of e-mail exchanges between "bdeanf" and other parties as well as an envelope with Defendant's name on it. Defendant's statements to Edgerton clearly reinforced the state's position that Defendant knew the contents of the blue binder, despite his denial of that knowledge at trial. Most damning perhaps was Edgerton's testimony that, when she confronted Defendant with the contents of the binder during the interview, he replied, "[M]y computer binder?" We cannot say, beyond a reasonable doubt, that these statements did not in fact contribute to or affect the verdicts in this case. While there is other, independent evidence that links Defendant to the binder, it is difficult to determine what part his statements played in reinforcing that evidence and in influencing the jury's assessment of his credibility.

¶34 The state contends that the error was harmless because Defendant testified that he had access and control over the vehicle, and admitted on cross-examination that he twice told

the detective all of the items in the vehicle were his. We have previously rejected the "proposition--that the State, having deliberately created constitutional error during its case-in-chief" can "save the conviction by arguing that the error became harmless when Appellant's counsel asked [the defendant] a few questions to try to minimize the damage" and the state "cross-examin[ed] the defendant on the same subject." *State v. Keeley*, 178 Ariz. 233, 236, 871 P.2d 1169, 1172 (App. 1994). While a defendant's statements made involuntarily and in violation of *Miranda* may be used to impeach, *Michigan v. Harvey*, 494 U.S. 344, 346 (1990), "the fact that Appellant's counsel asked [the defendant] some questions about this subject does not excuse the previous deliberate error by the prosecution." *Keeley,* 178 Ariz. at 236, 871 P.2d at 1172.

¶35 For these reasons we reverse the convictions and remand this case for further proceedings not inconsistent with this decision.

II. Prosecutorial Misconduct

¶36 Because we have reversed on other grounds, we need not address this argument save to say that our review of the record leads us to conclude that the prosecutor's statements here were within proper limits in response to arguments and representations raised by Defendant. *See State v. Morris*, 215 Ariz. 324, 336, ¶ 51, 160 P.3d 203, 215 (2007) (prosecutors have

wide latitude in presenting arguments to jury, drawing upon all reasonable inferences supported by the evidence at trial).

CONCLUSION

¶37 For the reasons stated above, we reverse Defendant's convictions and remand for further proceedings consistent with this decision.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
Daniel A. Barker, Judge

/s/
_____
Patricia K. Norris, Judge