

FILED: August 6, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AMANDA BURCIAGA,
Defendant-Appellant.

Marion County Circuit Court
09C49149

A146161

Albin W. Norblad, Judge.

On appellant's petition for reconsideration filed June 18, 2014. Opinion filed June 11, 2014. 263 Or App 440, ___ P3d ___ (2014).

Chris W. Dunfield for petition.

Before Duncan, Presiding Judge, and Haselton, Chief Judge, and Rasmussen, Judge pro tempore.

DUNCAN, P. J.

Reconsideration allowed; former opinion modified and adhered to as modified.

1 DUNCAN, P. J.

2 In our decision in *State v. Burciaga*, 263 Or App 440, ___ P3d ___ (2014),
3 we concluded that the trial court correctly denied defendant's motion for judgment of
4 acquittal on two counts of criminal mistreatment in the first degree, ORS 163.205. As
5 explained in our previous opinion, defendant left her two young children alone with her
6 boyfriend, Ros, while she went out of town on several occasions, knowing that Ros had
7 abused her older child, J. On one of those occasions, J was seriously injured, and, on a
8 subsequent occasion, the younger child, N, was killed. We rejected defendant's argument
9 that her conduct did not constitute the "withhold[ing of] necessary and adequate * * *
10 physical care" for the purposes of ORS 163.205 and, accordingly, affirmed the judgment
11 of conviction. Defendant now seeks reconsideration, contending that our decision
12 contained factual errors. *See* ORAP 6.25(1)(a) (factual error is appropriate basis for
13 reconsideration). We allow reconsideration to correct a factual error and adhere to our
14 previous opinion as modified.

15 Defendant takes issue with the italicized part of the following excerpt from
16 our previous opinion:

17 "Following the early-February 2008 assault, J was vomiting, had a fever,
18 was bruised, and was missing clumps of hair. Defendant photographed the
19 injuries and took J to the emergency room, *where she learned that J's*
20 *bruising and liver damage indicated that he had been subjected to an*
21 *intentional and substantial assault. She was told that J's injuries were*
22 *consistent with being punched, kicked, or stomped by an adult."*

23 263 Or App at 450 (emphasis added). Defendant contends that the italicized wording is
24 not supported by the record to the extent that there is no direct evidence that defendant

1 knew or was told those things. We modify that part of the opinion to state:

2 "Following the early-February 2008 assault, J was vomiting, had a fever,
3 was bruised, and was missing clumps of hair. Defendant photographed the
4 injuries and took J to the emergency room, where she learned that J had
5 elevated liver enzymes and was instructed to follow up with her
6 pediatrician. Although defendant was asked if it was possible that J had
7 been abused, she denied that possibility and failed to mention that he had
8 been staying with someone who had been convicted of assaulting him. If
9 defendant did not believe that Ros had abused J before she took him to the
10 emergency room, it strains credulity to think that being questioned about
11 possible abuse would not have caused her to suspect, if not believe, that
12 Ros had again abused J as he had done in the past.²

13

14 ² In rejecting defendant's argument that her conduct did not constitute
15 first-degree criminal mistreatment, the trial court stated:

16 "[S]he had three chances to do it right. Upon his conviction in
17 Washington County for abusing the child, she had a right to make
18 choices. In fact, there's no doubt in my mind but that she knew what
19 the judgment said and in light of that and in light of the abuse, she
20 chose Mr. Ros as opposed to choosing to protect the children. The
21 second time would have been February 8th when she took the
22 pictures and mailed them off to [her] father of the bruises * * *.
23 Clearly, this put her on notice of Mr. Ros' abusive nature and what
24 did she do? The next day she left for Las Vegas.'

25 "We agree that the information available to defendant after the early-
26 February 2008 incident gave her notice that Ros had again abused J."

27 In addition, we modify another part of our former opinion, also describing
28 the early-February assault, to state:

29 "In early February 2008, defendant went out of town and left J and N
30 with Ros. J was three years old, and N was two years old. When defendant
31 returned on the night of February 7, J was throwing up and had a fever.
32 The next morning, defendant observed that J had 'pink spots' that she
33 ultimately recognized as bruises on his chest and was missing clumps of
34 hair from the top of his head. She asked Ros about J, and he responded that
35 J was just sick. Defendant called her father, who suggested that she

1 photograph J's injuries and send the photographs to him. Once he saw the
2 photographs, defendant's father suggested she take J to the doctor.
3 Defendant took J to the emergency room later that day. J was bruised in an
4 uncommon pattern that indicated that his injuries were inflicted, not
5 accidental. X-rays were taken, and there was no evidence of fractures at
6 that time. Lab tests revealed that J had elevated liver enzymes; emergency
7 room staff advised defendant of J's elevated liver enzymes and instructed
8 her to schedule a follow-up visit for J with a pediatrician. In response to
9 questions from emergency room staff, defendant denied that J could have
10 been abused. She did not mention that J had been staying with someone
11 who had been convicted of assaulting him. A doctor later determined that J
12 had suffered crushed liver damage that was consistent with being punched,
13 kicked, or stomped by an adult."

14 263 Or App at 442-43.

15 Defendant further contends that we should reconsider defendant's claim of
16 error in light of the corrected facts. We have done so, and we adhere to our previous
17 analysis and conclusion.

18 Reconsideration allowed; former opinion modified and adhered to as
19 modified.