2019 IL App (2d) 170553-U
No. 2-17-0553
Order filed September 10, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NICHOLLE M. MARTINEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 14-CF-750 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Birkett and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: Although the trial court erred in denying defendant's motion to suppress statements, the error was harmless because the evidence that defendant intended to kill the victim was overwhelming. Further, defendant was not denied a fair trial because the prosecutor's remarks during rebuttal closing argument were responsive to defense counsel's argument and not improper. Thus, we affirmed.

¶ 2 Following a jury trial, defendant, Nicholle M. Martinez, was found guilty of attempted first-degree murder and sentenced to seven years' imprisonment. Defendant appeals, arguing that (1) the trial court erred in denying her motion to suppress statements; and (2) she was denied a fair trial because the prosecutor's remarks during rebuttal closing argument disparaged defense

counsel and appealed to the jury's prejudices. Although we agree with defendant that the trial court erred in denying her motion to suppress, we affirm her conviction because the evidence that she intended to kill the victim was overwhelming and because the prosecutor's closing argument remarks in rebuttal were invited by defense counsel and not improper.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested shortly after 4 a.m. on September 27, 2014, after stabbing her husband's girlfriend, Elena Mora Garcia, with a box cutter on both sides of her neck. Defendant was charged by indictment on October 27, 2014, with attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2014)) and aggravated battery with a deadly weapon (720 ILCS 5/12-3.05(f)(1) (West 2014). Defendant filed a motion to suppress statements on December 30, 2014, arguing that she invoked her right to counsel after answering preliminary questions posed to her by the arresting officer, but that the investigating detective nevertheless resumed questioning and obtained inculpatory statements from her without first providing her with an attorney. The trial court conducted a hearing on the motion to suppress on February 24, 2015.

¶ 5 Suppression Hearing

¶ 6 Officer Chris Sullivan testified that in the early morning of September 27, 2014, he was dispatched to an apartment complex on Sycamore Road in reference to a woman who had been stabbed. When he arrived at the scene, he saw defendant sitting on a stoop near an entry door to the complex and three or four people standing behind her. He asked the group what had happened, and defendant "raised her hands [in a handcuffing position] and said 'I attacked her.' " Defendant was wearing rubber gloves. Sullivan searched and handcuffed defendant, and then secured her in a squad car. He advised her of her *Miranda* rights, and defendant stated that she understood them. Sullivan asked defendant what happened, and she replied that her husband was

having an affair with Elena, that she "lost it," and it was "too much." Sullivan testified that he asked defendant if she had been there for a while, and "she said that she thought she should speak with an attorney." Sullivan then stopped questioning defendant and did not question her again. At the police station, Sullivan briefed Detective Nachman about the case and informed him that defendant "mentioned she said she thought she should speak with an attorney."

¶ 7 Detective Mark Nachman testified that he was called in to the station on the morning of the stabbing. Before he met with defendant, he spoke with Officer Sullivan, who told him that defendant "said she thought she should speak to an attorney." He did not take it as an invocation of defendant's right to speak to an attorney, and he had some doubt as to whether the statement constituted an unequivocal demand for an attorney. He went to speak to defendant with the intention of obtaining a statement from her, and he brought a waiver of *Miranda* rights form with him. Nachman spoke with defendant while she was in a holding cell. He testified that he "told her that [he] was aware she had made mention of wanting to talk to an attorney and [he] wanted to clarify with her what she had said and [he] asked her to–[he] read her *Miranda* rights again, waiver." He told defendant that it was her option as to whether or not she wanted to speak with an attorney. After Nachman read the *Miranda* warnings aloud, defendant indicated that she understood them, then signed the waiver and agreed to speak with him. Defendant stated that "it doesn't matter anymore" and "[she] might as well talk." Defendant provided statements to Nachman concerning the events leading up to the incident, as well as the offense itself. At some point, Nachman asked defendant if he could videotape their conversation, and defendant agreed. Defendant again went into detail concerning what happened in the recorded statement.

¶ 8 The trial court denied the motion to suppress, reasoning that defendant's statement was ambiguous or equivocal such that a reasonable officer under the circumstances would have

understood only that defendant *might* have invoked the right to counsel. In so ruling, the court was explicitly persuaded by *Davis v. United States*, 512 U.S. 452 (1994) (holding suspect's statement, "[m]aybe I should talk to a lawyer," was insufficient to invoke the right to counsel), and *In Re Christopher K.*, 217 Ill. 2d 348 (2005) (holding a minor's question, "[d]o I need a lawyer?" to be insufficient). The trial court stated that further questioning of defendant was permissible to determine whether she had invoked her right to counsel.

¶ 9 The Trial

¶ 10 A jury trial was held over three days in May 2017. With the aid of an interpreter, Elena testified as follows. She met defendant's husband, Luis Martinez, in 2007 or 2008. Luis was her supervisor at Taco Bell, where they both worked. She and Luis commenced a sexual relationship in mid-2008, and defendant became aware of their relationship. In the early morning hours of September 27, 2014, Elena was still out with Luis from the prior evening. Between 3:30 and 4 a.m., she drove home and parked her vehicle in the parking lot of her apartment complex on Sycamore Road in De Kalb. As she gathered her belongings to exit her vehicle, something very hard struck her on the head, and she was attacked by defendant. She initially did not know that it was defendant because her face was covered. Defendant pushed her back inside the car and cut her with a box cutter on both sides of her neck. During the struggle, she tried to push defendant away with one hand and used her other hand to honk her vehicle's horn in an effort to get help. Defendant continued to attack and beat her. She told her attacker that she did not want to die, and defendant replied, "[o]h, you don't want to die?" She then recognized defendant's voice. She was able to push defendant away and exit her vehicle, but defendant pushed her to the ground and put her hand on her neck. At that point, Elena's daughter, Anayeli Victoria, and her daughter's boyfriend, Magandy Montero, came outside and

pulled defendant off of her. Elena asked defendant why she did it, and defendant replied "because I couldn't compete."

¶ 11 During her testimony, Elena identified photos of the inside of her vehicle showing the rock that she was struck with on the driver's side seat, as well as blood on the center console. She also confirmed that all of the injuries shown in the photographs of her admitted at trial came from the attack. The photos, which we have viewed, show blood coming from Elena's left temple, a black right eye, swelling and bruising to her right cheek and lower lip, and puncture wounds on both sides of her neck.

¶ 12 Anayeli testified that she was living with Elena and her two younger sisters at the time of the incident. She and Montero were asleep at about 4 a.m. when she was awoken by the sound of a woman screaming outside. She looked out a window and saw her mother on the ground of the parking lot and a person on top of her. She woke up Montero, and they ran outside. She tried to get defendant off of her mother, but she was unable to. Montero came up from behind her and was able to get defendant off of her mother. She helped her mother get up from the ground and told her sister to call the police.

¶ 13 Montero testified that he had known defendant since he was about 12 or 13 years old because she was a family friend. He was awakened by Anayeli, who told him that someone was attacking her mother. When he got outside, he saw someone wearing a mask and gloves and holding a box cutter on top of Elena, who was on the ground of the parking lot. He ran up to the attacker, kicked and punched her, and then put her in a "choke hold" to restrain her. When defendant spoke and her mask fell off, he realized that he knew her. He asked defendant why she did it, and she answered that he "already knew." Defendant told him that she was "okay" and "fine," and she sat down on the stoop. Montero stood next to defendant to "make sure that

she didn't attack again or try anything else," and Anayeli held on to defendant. Defendant gave Montero an absorbent pad and told him to give it to Elena to help stop the bleeding. He observed that defendant wore a mask, gloves, and a black hoodie, and that defendant had a box cutter. Defendant also had a backpack with her, but he was unsure what was inside of it. He observed that Elena was very frightened, and she had cuts on both sides of her neck, as well as bruising and swelling.

¶ 14 Officer Chris Sullivan testified similarly to his testimony at the suppression hearing.

¶ 15 Officer Reda Reese testified that when she arrived at the scene, she saw a group of people gathered around the door on the east side of the building. She observed that one woman was bloody, and another woman, whom she identified as defendant, was wearing rubber gloves. She assisted Officer Sullivan in bringing defendant to a squad car. She patted down defendant and observed that she was wearing two pairs of pants. Defendant told her that she had walked there and that it was cold outside. Defendant was then placed in a squad car, and Officer Sullivan read defendant her *Miranda* rights. Defendant told them that her husband was having an affair and it got to be "too much." After that, defendant "mentioned something about she thought she should talk to an attorney," but she could not remember the exact words defendant used.

¶ 16 Detective Nachman testified that he had worked for the De Kalb police department for over 21 years, and he had been assigned as a detective for over 15 years. He was the main detective on the case, and it was his responsibility to interview defendant. Prior to the interview, he spoke with Officer Sullivan, who informed him that defendant said she thought she needed a lawyer. He decided to talk to defendant so that he could get a statement from her. He wanted to get to the truth and prosecute the case "if she did it." He met with defendant, handed her a

Miranda form, told her that those were her rights, and asked her to read them aloud.[1] Defendant read the *Miranda* form out loud, indicated that she understood her rights, and signed the *Miranda* waiver. Nachman testified that his initial interview of defendant was unrecorded and lasted 15 to 30 minutes. Defendant was very cooperative, and she mentioned that she eventually wanted a lawyer. Defendant told him that her husband had been having an affair with Elena for the past seven years, and she had thought about doing something about it in the past but never followed through with it. She did not want Elena to be around anymore, and she used the words "premeditated murder." The night of the incident, defendant packed a razor blade, a scalpel, and an extra pair of clothes. She hid and waited outside of Elena's apartment. As Elena was getting out of her car, defendant attacked her with a rock that she found in the parking lot. The blow did not knock Elena unconscious, and defendant and Elena began to fight. During the struggle, defendant was unable to get out the scalpel she brought with her, so she tried to cut Elena with the box cutter she had. Defendant agreed to give a video-recorded statement.

¶ 17 The State introduced the video recording of defendant's statement to Detective Nachman, which was admitted as People's Exhibit 56 and published to the jury. We have viewed the recording, which is approximately 38 minutes long. Therein, Detective Nachman noted that they began talking about 10 or 15 minutes prior to the recording, and that defendant had read the *Miranda* warning, understood it, and agreed to it. Nachman remarked that defendant had been "beyond cooperative," and defendant stated that she would eventually need an attorney to

[1] We observe that Detective Nachman's trial testimony concerning who read the *Miranda* warnings differed from his earlier testimony. At the suppression hearing, Nachman testified that he read defendant's *Miranda* rights aloud to her. At trial, he testified that he asked defendant to read the *Miranda* rights aloud to him from the pre-printed *Miranda* waiver form he provided.

represent her because she could not afford one. Nachman commented that he understood, and then asked her to tell him what had happened.

¶ 18 In the recording, defendant stated that she went to bed at around 10 p.m. but could not sleep because her mind was racing. She "tried not to think about it" and "tried not to plan it." She walked to Elena's apartment using an indirect route, and brought with her a surgical mask, gloves, goggles, a box cutter, and a scalpel. During the walk, she thought about how she could execute a "painless death" by knocking Elena unconscious and cutting her carotid artery.

¶ 19 Defendant stated that when Elena arrived home, defendant crept up from behind a shed, hit Elena with a rock, and started to attack her. Elena fought back, which made defendant even angrier. Defendant cut Elena with a box cutter several times on her neck. Elena began to honk her horn during the struggle, and defendant tried to stop her. By that time, defendant became very angry and "didn't stop" until Elena's daughters came out and Montero restrained her. She was in a "blind rage" during the attack, and it was a "good thing" that the scalpel dropped out of her pocket because she would have been able to "slice" Elena's throat with it. She told Nachman that if they had not yet found the scalpel, they would find it in Elena's car.

¶ 20 Nachman inquired as to her intent in going to Elena's apartment, and defendant stated that she wanted to make her "go away." Nachman asked her whether she wanted to kill Elena, and defendant replied in the affirmative, stating "I flat out wanted to kill her." She stated that if Montero had not stopped her, the police would have probably found a body in the dumpster. She thought things out "way too much," and she wore clothes that would not be missed and brought matches with her to burn her clothes. She also stated that she wore gloves to prevent fingerprints from being left behind, and she wore a surgical mask during the attack.

¶ 21 Detective Michael Stewart testified that on the morning in question he was called to the scene to assist in processing, during which he found a scalpel in Elena's vehicle wedged between the center console and the passenger seat that was still in its packaging.

¶ 22 Defendant testified at trial that she worked in a hospital as a medical technologist, where she performed blood, urine, and microbiology testing. She was married to Luis Martinez, with whom she had three children. Approximately seven years before the attack, she learned that Luis was having a sexual affair with Elena. She thought about the affair all the time, and she told Luis that she was not "okay" it. She communicated with Elena during those years, in that they called each other and exchanged text messages. Elena sometimes brought her youngest child with her when they would talk.

¶ 23 During the early-morning hours of September 27, 2014, defendant walked the approximately three to four miles to Elena's apartment—even though she had a vehicle and a driver's license. She intended to confront and scare her into leaving her husband alone. She was dressed in black pants, a black long-sleeved shirt, and a black sweatshirt. Defendant brought a bag containing an extra sweater, several pairs of rubber gloves, safety goggles, face masks, a scalpel, a box cutter, matches, and absorbent pads. She arrived at Elena's apartment around 2:30 a.m., but Elena was not yet home. Defendant found a rock, then hid and waited for Elena in the parking lot. Defendant did not want to kill Elena because that "would take [defendant] away from [her] family." She did not know what she was going to do when Elena got there. Defendant hit Elena with the rock when she arrived home, and a struggle ensued. If Montero had not stopped her, she did not know what would have happened. She was wearing two pairs of rubber gloves at the time, and she dropped the scalpel that she brought with her in Elena's car. After the incident, she handed the absorbent pads she brought with her to Montero and told him

to give them to Elena to help stop the bleeding. During her conversation with Detective Nachman, she "felt responsible for hurting someone." She acknowledged her videotaped statements, but testified that she was "in a fog" at the time. Nachman was "pushy," and she wanted to tell him "[w]hatever would make him happy" and "whatever would [allow her to] take full responsibility [for] everything that happened."

¶ 24 During closing arguments, the State argued that considering the nature and severity of the attack, the supplies defendant brought with her, defendant's statements to Detective Nachman, her medical background, and the history between defendant and the victim, it was evident that defendant intended to kill the victim. Defense counsel argued that she did not intend to kill Elena because she did not have the mental capacity due to her exhaustion and a recent change in the medication she was taking.

¶ 25 On May 11, 2017, the jury found defendant guilty of attempted murder. Defendant filed a motion for a new trial challenging the trial court's denial of her motion to suppress and allowing the State to argue that the jury should not consider defendant's "prior life history" in reaching a verdict. On June 22, 2017, the circuit court denied the motion and sentenced defendant to 7 years' imprisonment. Defendant timely appealed.

¶ 26 ANALYSIS

¶ 27 Invocation of Fifth Amendment Right to Counsel

¶ 28 Defendant first contends that the trial court erred in denying her motion to suppress because her statement to Officer Sullivan, "I think I should speak with an attorney," was a clear and unequivocal invocation of her fifth amendment right to counsel such that questioning should have ceased until she received counsel. She asserts that Sullivan "honored her right" when he immediately stopped questioning her and informed Detective Nachman of her statement at the

police station. Defendant stresses that police questioning resumed, however, when Detective Nachman initiated contact with her in order to obtain a statement despite knowing that she told Officer Sullivan that she thought she should speak with an attorney. Because an attorney was never made available to her during the questioning after she requested for the assistance of one, she contends that her statements to Nachman, including her video recorded statement, should have been suppressed. In response, the State argues that defendant's statement was ambiguous and did not constitute a demand for counsel because she did not explicitly tell the officers that she wanted an attorney *immediately* or that she wanted counsel *before* speaking to them. According to the State, because defendant's statement "did not refer to a specific timeframe," she did not invoke her right to counsel, and the trial court therefore properly denied her motion to suppress.

¶ 29 When reviewing a ruling on a motion to motion to suppress evidence, we typically are presented with both questions of fact and law. *People v. Manzo*, 2018 IL 122761, ¶ 25. We accord great deference to a trial court's findings of fact and credibility, and we will uphold such findings unless they are against the manifest weight of the evidence. *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 22. However, we review *de novo* the ultimate question of whether the evidence should have been suppressed. *In re Christopher K.*, 217 Ill. 2d 348, 373 (2005). In making this determination, we may consider the entire record, including the trial testimony. *People v. Simpson*, 2015 IL App (1st) 130303, ¶ 22; *People v. Harris*, 2012 IL App (1st) 100678, ¶ 45. Here, the particulars of defendant's encounter with Officer Sullivan, including the words she used in purportedly invoking her right to counsel, are not in dispute. Accordingly, we need evaluate only the trial court's ultimate legal determination that suppression of defendant's

statement was not warranted, which we review *de novo*. See *People v. Schuning*, 399 Ill. App. 3d 1073, 1081 (2010).

¶ 30 Under *Miranda* and its progeny, and as a means to protect the fifth amendment right against self-incrimination, an individual subjected to custodial interrogation or under imminent threat of interrogation is entitled to have counsel present during questioning. *Harris*, 2012 IL App 100678, ¶ 69 (citing *Miranda*, 384 U.S. at 444-45). Law enforcement officials must advise the individual of that right, as well as the right to remain silent, prior to any interrogation. *In re Christopher K.*, 217 Ill. 2d at 376 (citing *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)).

¶ 31 Once the suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda*, 384 U.S. at 444-45. If the suspect requests counsel at any time during the interview, he or she "is not subject to further interrogation until counsel has been made available, unless the accused himself initiates further communications, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *In re Christopher K.*, 217 Ill. 2d at 376. In applying the prophylactic *Edwards* rule, as a threshold inquiry, it is necessary to determine whether the suspect actually invoked his or her right to counsel. *Davis*, 512 U.S. at 458; *In re Christopher K.*, 217 Ill. 2d at 376. "To avoid difficulties of proof and to provide guidance to officers conducting interrogations," the determination of whether the suspect actually invoked the right to counsel under *Edwards* is an "objective inquiry." *Davis*, 512 U.S. at 458-59. We use the objective test as set forth in *Davis* regardless of whether the alleged invocation of the right to counsel was before or after a knowing and voluntary waiver of the suspect's *Miranda* rights. *In re Christopher K.*, 217 Ill. 2d at 380-81. The second part of the *Edwards* rule applies if the accused has invoked the right to counsel. In such case, "courts may admit his responses to

further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith v. Illinois*, 469 U.S. 91, 95 (1984).

¶ 32 This case involves the threshold inquiry, namely whether defendant invoked her right to counsel when she stated "I think I should speak with an attorney." It is well established that "[i]nvocation of the right to counsel minimally requires a statement that can reasonably be construed to be an expression of a desire for the assistance of counsel." *Schuning*, 399 Ill. App. 3d at 1082 (citing *Davis*, 512 U.S. at 459). However, not every reference to an attorney, "no matter how vague, indecisive or ambiguous, should constitute an invocation of the right counsel." *People v. Krueger*, 82 Ill. 2d 305, 311 (1980). When the suspect makes an ambiguous or equivocal reference to an attorney such that a reasonable officer in light of the circumstances "would have understood only that the suspect *might* be invoking the right to counsel, [United States Supreme Court] precedents do not require the cessation of questioning." (Emphasis in original.) *Schuning*, 399 Ill. App. 3d at 1082 (quoting *Davis*, 512 U.S. at 459, finding the statement "maybe I should talk to a lawyer" to be an ambiguous invocation). Although the suspect "need not articulate his desire in the manner of a Harvard linguist, *** he must articulate his desire in a clear enough manner that a reasonable officer in the circumstances would understand the statement to be a request for an attorney." *Schuning*, 399 Ill. App. 3d at 1082 (citing *Davis*, 512 U.S. at 459). A statement invoking the right to counsel must be "at least sufficiently free of indecision or double meaning to reasonably inform the authorities that the accused wishes to speak to counsel." *In re Christopher K.*, 217 Ill. 2d at 382.

¶ 33 Applying the *Davis* objective test, we conclude that defendant's statement, "I think I should speak with an attorney," was sufficiently clear such that a reasonable officer in the

circumstances would have understood it to be a request for an attorney. At the suppression hearing, Officer Sullivan testified that he arrived at the scene and saw a group of people near the entry door to the apartment complex. He asked the group what had happened, and defendant stated "I attacked her" whilst raising her hands in a handcuffing position. Sullivan then handcuffed defendant, searched her, and put her in a squad car. He advised defendant of her *Miranda* rights, which she indicated she understood. He asked defendant what happened, and she replied that her husband was having an affair with Elena, that it was "too much," and she "lost it." He then asked defendant how long she had been there, and she stated "I think I should speak with an attorney." Sullivan then ceased questioning and did not question her again. The plain meaning of defendant's statement is inescapable and is not reasonably subject to alternative interpretations. Put simply, there is no other way to interpret the statement other than that defendant wanted to speak with an attorney, and any reasonable officer in the circumstances would have understood it to be a request for an attorney—as Officer Sullivan plainly did when he immediately ceased all questioning.

¶ 34 In reaching this conclusion, we find instructive *Schuning*, 399 Ill. App. 3d 1073; and *Harris*, 2012 IL App (1st) 100678. In *Schuning*, the defendant was read his *Miranda* rights and questioned by police while hospitalized in an intensive care unit (ICU). *Schuning*, 399 Ill. App. 3d at 1075-77. The defendant later asked an officer to use the telephone to call his attorney and, although the officer told defendant that he could call his attorney, the nurse told him that phones could not be used in the ICU. The defendant eventually fell asleep and was unable to place the call. *Id*. at 1075. Police later re-administered *Miranda* warnings and obtained statements from the defendant. On appeal, we upheld the suppression of the defendant's statements subsequent to

his request to call his attorney because his request was unambiguous and "not tainted with hesitation or uncertainty." *Id.* at 1087.

¶ 35 In *Harris*, the defendant asked a detective whether it was "possible" to "have a few days to get an attorney." The detective answered "[w]e can't give you a few days, no," and told the defendant that if she was requesting an attorney they were "done talking." After the defendant said that she could not make any calls because she did not have any contact phone numbers with her, the detective asked her, "[d]o you no longer want to answer questions?," to which the defendant replied "[y]eah, I want to answer questions." *Harris*, 2012 IL App (1st) 100678, ¶ 17. The trial court found the defendant's invocation of the right to counsel ambiguous (*id.* ¶ 70), but the appellate court reversed, holding that the defendant's initial query whether it was "possible" to "have a few days to get an attorney" constituted an unequivocal invocation of the right to counsel (*id.* ¶ 72). The court went on to state that any ambiguity in the query pertained not to whether the defendant wanted an attorney, but to the process for doing so and how long it would take. *Id.* ¶ 72.

¶ 36 We note that, in the instant matter, the State identifies no words in defendant's statement, nor do we find any, that indicate any ambiguity, indecision, or uncertainty. For this reason, the cases relied on by the State, wherein the suspects' statements were held not to be a sufficiently clear invocation of the right to counsel, are distinguishable. For example, in *Davis*, 512 U.S. 452, the United States Supreme Court upheld the lower court's determination that the defendant's statement, "[m]aybe I should talk to a lawyer," was not a clear invocation of the right to counsel. In *People v. Krueger*, 82 Ill. 2d 305, 312 (1980), our supreme court held that the defendant's remark that "[m]aybe I ought to have an attorney," "[m]aybe I need a lawyer," or "[m]aybe I ought to talk to an attorney," was not a clear invocation of the right to counsel

because "a more positive indicator or manifestation of a desire for an attorney was required." *Id*. at 312. Similarly, in *In re Christopher K.*, 217 Ill. 2d 348, 383, our supreme court determined that a juvenile suspect's question, "[d]o I need a lawyer?," was not sufficiently clear such that a reasonable officer would have understood it to be a request for counsel. Rather, the question was phrased as a request for advice. In *People v. Tackett*, 150 Ill. App. 3d 406 (1987), the appellate court concluded that the defendant's statements that "I might be needing [an attorney]" and "I probably should [speak to an attorney]" did not reasonably inform the police that he wished to speak to counsel. There, the court noted that "these statements were not 'sufficiently free of indecision or double meaning to reasonably inform the authorities that [the accused] wished to speak to counsel." *Id*. at 418 (quoting *Smith*, 102 Ill. 2d at 376). Here, defendant's statement did not include any indecisive or ambiguous words such as "maybe," "might," or "probably," nor could the statement be reasonably construed as a request for legal advice. Rather, the statement was straightforward and sufficiently clear such that a reasonable officer under the circumstances would have understood it to be a request for counsel.

¶ 37 Although the State is correct that defendant did not tell the officers explicitly that she wanted an attorney either *immediately* or *before* speaking with them, it cites no authority either requiring the suspect to include a verbal expression of such an adverb, nor supporting the assertion that the absence of one should render ambiguous an otherwise clear expression of the desire for counsel. Here, the timing of defendant's statement is telling. Our supreme court has made clear that although the primary focus "should remain on the nature of the actual statement at issue," the trial court "may consider the proximity between the *Miranda* warnings and the purported invocation of the right to counsel in determining how a reasonable officer in the circumstances would have understood the suspect's statement." *In re Christopher K.*, 217 Ill. 2d

at 381. Here, Officer Sullivan testified that he placed defendant in a squad car and read aloud her *Miranda* rights from a pre-printed card, which properly included the statement that she had "the right to an attorney and have them present during questioning." Defendant stated that she understood her rights, and Sullivan began questioning her. He first asked her what happened, and defendant replied that her husband was having an affair with Elena, it was "too much," and she "lost it." He next asked defendant how long she had been there. Rather than answer the question, defendant simply stated, "I think I should speak with an attorney." Of note, defendant's statement followed only the second question asked of her after she was advised of her right under *Miranda* to have an attorney present during questioning. Accordingly, our determination that defendant's statement was sufficient is buttressed by the undisputed context in which it was made and its close temporal proximity to defendant's receipt of the *Miranda* warnings.

¶ 38 The State also argues that defendant's video-recorded comment to Detective Nachman that "eventually I need a lawyer" is circumstantial evidence that defendant had not previously invoked her right to counsel. We reject this assertion because once an accused requests counsel, all questioning must cease and subsequent statements or responses may not be used to cast doubt on the adequacy of the initial request. *Smith*, 469 U.S. at 98-100. Further, it is of no import that defendant signed a *Miranda* waiver after Nachman met with her in a holding cell. As discussed above, defendant's statement to Officer Sullivan was sufficient to invoke her right to counsel, and Detective Nachman was told of the statement by Sullivan, who had ceased questioning defendant upon hearing it. Defendant should not have been subjected to further interrogation until counsel had been made available to her (see *In re Christopher K.*, 217 Ill. 2d at 376), and Detective Nachman should have known better than to initiate contact with defendant absent

counsel. After invoking the right to counsel, if police subsequently initiate a conversation with the suspect in the absence of counsel, his or her statements are presumed involuntary, and a motion to suppress should be granted. *People v. Woolley*, 178 Ill. 2d 175, 197 (1997). It is undisputed that defendant did not initiate any conversation with Detective Nachman. As such, the trial court erred in denying defendant's motion to suppress.

¶ 39 Whether The Error Was Harmless Beyond a Reasonable Doubt

¶ 40 We next evaluate defendant's contention that the trial court's decision to deny her motion to suppress was not harmless beyond a reasonable doubt. The parties agree that the admission of a statement obtained in violation of *Miranda* requires a new trial unless the error was harmless beyond a reasonable doubt (*People v. R.C.*, 108 Ill. 2d 349, 355 (1985)), and that the burden rests with the State to prove that the error was harmless beyond a reasonable doubt (*People v. Thurow*, 203 Ill. 2d 352, 363 (2003)). Defendant argues that the error was not harmless because the central issue in the case was whether she had the intent to kill, which the State was required to prove in order to convict her of attempted murder. Defendant asserts that the State repeatedly referenced her statements to Nachman in its opening and closing arguments in order to prove intent, as well as utilized her videotaped statement to rebut her testimony at trial that she did not intend to kill. The State responds that even if the admission of defendant's statements to Nachman was in error, it was harmless beyond a reasonable doubt in light of the overwhelming evidence against defendant.

¶ 41 A person commits the crime of attempt when, with the intent to commit a specific offense, in this case murder, he or she performs any act which is a substantial step toward the commission of that offense. 720 ILCS 5/8-4(a) (West 2014). Attempted murder requires that

the State prove defendant made a substantial step toward the commission of murder while possessing the intent to kill the victim. *People v. Stanford*, 2011 IL App (2d) 090420, ¶ 44.

¶ 42 We agree with the State that the evidence that defendant intended to kill Elena was overwhelming and conclude that it met its burden of proof that the error was harmless beyond a reasonable doubt. While we are cognizant that the admission of an unlawfully obtained confession rarely is harmless error (see *People v. St. Pierre*, 122 Ill. 2d 95, 114 (1988)), such a case is presented here. The evidence at trial conclusively established that defendant was Elena's attacker. Although her statements to Nachman were powerful evidence regarding her intent, the remaining evidence was nevertheless sufficient to prove that she intended to kill Elena. Indeed, we have acknowledged that specific intent to kill is normally inferred from the surrounding circumstances rather than established through direct evidence. Circumstances that may give rise to such an inference include the character of the attack, the use of a deadly weapon, and other matters from which intent to kill may be inferred. *People v. Peters*, 2018 IL App (2d) 150650, ¶ 19.

¶ 43 The circumstances of the attack in the instant case establish that defendant intended to kill Elena. While she was dressed in all black clothing, defendant walked over three miles in the middle of the night to the apartment complex of the victim, who had been having a sexual affair with her husband. She walked despite having a vehicle and drivers license. Defendant brought a bag containing an extra sweater, multiple pairs of rubber gloves, safety goggles, surgical face masks, absorbent pads, matches, and two weapons—a scalpel and a box cutter. When defendant arrived at the apartment complex, the victim was not yet home, so she hid and waited for her to return. Defendant, while wearing a surgical mask and two pairs of gloves, struck the victim in the head with a rock as she prepared to exit her vehicle, causing the victim's head to bleed.

During the struggle, the scalpel dropped between the seat and center console of the victim's vehicle, but defendant was able to use the box cutter she brought with her to stab the victim on both sides of her neck. The victim also sustained other injuries, including a black eye and bruising to her right cheek and bottom lip. The attack ended only after the boyfriend of the victim's daughter restrained defendant by pulling her off the victim and putting defendant in a "choke hold." Indeed, defendant testified that she "didn't know what would [have] happen[ed]" if he had not stopped her. When Officer Sullivan arrived at the scene, defendant stated "I attacked her" and put her hands in front of her in a handcuffing position. After defendant was arrested, searched, and advised of her *Miranda* rights, she stated she "lost it" because her husband was having an affair with the victim, and it was "too much." The preparation and character of the surprise attack, including the use of a rock to strike the victim's head, defendant's of use of a box cutter to stab the victim on both sides of her neck, and the fact that the attack did not cease until defendant was physically overpowered and prevented from continuing, establish beyond a reasonable doubt that defendant had the specific intent to kill. Moreover, defendant's argument that she intended only to confront and scare Elena into leaving her husband alone is incredible in light of the fact that she went to great lengths to conceal her identity.

¶ 44 Whether the State's Closing Argument Denied Defendant a Fair Trial

¶ 45 Defendant's final contention is that the State's rebuttal closing argument denied her a fair trial. Specifically, she contends that the State disparaged the integrity of defense counsel by misrepresenting its argument and accusing it of asking the jury to apply the law differently in her case because of her status as a suburban middle-aged white woman. She frames defense counsel's closing argument as stressing that "under the circumstances and based on [defendant's]

testimony, she lacked the requisite intent [to kill]." Similarly, she contends that certain comments made by the prosecutor were prejudicial because they were racially charged and intended to appeal to the prejudices of the jury, as well as suggested that the jury's verdict should be the same as what it would find for someone other than defendant. Defendant draws our attention to the following comments:

"[PROSECUTOR:] Now, what is the defense attorney trying to get you to think about when he suggests you should consider the circumstances of the defendant's life[?] Is he somehow suggesting that the law is different for her than for anybody else[?]"

[DEFENSE COUNSEL:] Objection.

THE COURT: Overruled. This is argument.

[PROSECUTOR:] That somehow because of who she is, that the law applies to her a little bit differently than it would to somebody else?

[DEFENSE COUNSEL:] Objection.

THE COURT: Overruled.

[PROSECUTOR:] And I want to talk to you a little bit about this argument about her status and about the application of the law, and let's go back to something that we talked about during jury selection, and that was if you believed in the equal application of the law, and each and every one of you said yes. Each and every one of you also said that you believe in the criminal justice system, but the criminal justice system only works if each and every person in it does their job and follows the rules of their job, and one of the very first things that Judge Stuckert is going to tell you about your job is that you are to decide your verdict based on the law and the facts and that neither sympathy nor prejudice should influence you. So you can ask yourselves if this argument isn't in some

way an inherently prejudicial argument, a request for you to apply the law differently, not equally."

[DEFENSE COUNSEL:] Objection.

THE COURT: Overruled.

[PROSECUTOR:] Let me explain. If we take the exact same situation, the exact same actions that [*sic*] the time defendant took going over to a person's home in the middle of the night, hiding in the shadows, waiting for them to come home, creeping up, hitting them with a rock as they try to exit their car, continuing to attack them, trying to cut their throat, telling the police that they did it because they wanted that person dead, [and] telling the police that they were going to throw the body in the garbage. Now, let's consider those acts being committed not by a 40-year-old woman in Sycamore, Illinois, but a 20-year-old man on the south side of Chicago. There would be no question that it was a[n] attempt. The defendant does not get a special set of laws. The law applies equally, and under the law she is guilty of attempt murder. Thank you."

¶ 46 The State contends that defendant's argument concerning the comparison of defendant's actions to those of a hypothetical "20-year-old man on the south side of Chicago" was forfeited because she did not object to the statement at trial. Concerning the other statements, the State argues that they were appropriate because they were invited by defense counsel's argument that the jury should look "behind" the uncontested facts of the case and at the circumstances of defendant's life both before and after the attack.

¶ 47 We first evaluate the State's forfeiture argument. Here, the State appears to recast defendant's claimed error concerning the State's rebuttal into two separate issues and argue that defendant has forfeited one of them. This reading of defendant's argument is far too

compartmentalized and overlooks the fact that the State's comparison during closing argument of defendant's actions to those of a hypothetical defendant was a continuation of the argument that defendant already objected to and was overruled on three times. It is therefore appropriate to review the complained-of comments made by the State together. Further, while defendant's objections to the State's rebuttal were general, her assertion in her posttrial motion that "[t]he State improperly argued that the jury should not judge defendant's prior life history" adequately specified the State's line of argument about applying the law "differently." In order to preserve a claim of error on appeal, a defendant must both object at trial and raise the error in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant has done both, and so the issue was preserved.

¶ 48 Before turning to the merits, we note that the standard of review for reviewing closing remarks is uncertain because our appellate courts are divided on the issue. See *People v. Ealy*, 2015 IL App (2d) 131106, ¶ 76. Defendant advocates for *de novo* review, relying on our supreme court's decision in *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). There, the court held that whether a prosecutor's remarks were so egregious as to require a new trial presents a question of law, which we review *de novo*. As we noted in *Ealy*, however, the *Wheeler* court cited with approval its decision in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), wherein it applied an abuse-of-discretion standard to evaluate a prosecutor's closing argument remarks. *Ealy*, 2015 IL App (2d) 131106, ¶ 76. We need not determine which standard is appropriate because, here, we would reach the same result under either standard.

¶ 49 It is well-settled that prosecutors are afforded wide latitude in delivering closing arguments. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). A prosecutor may properly comment on the evidence and on any reasonable inferences that may be drawn therefrom. *People v.*

Glasper, 234 Ill. 2d 173, 204 (2009). A prosecutor may also respond to comments made by defense counsel that invite response and comment on the credibility of witnesses. *People v. Rader*, 178 Ill. App. 3d 453, 466 (1988). However, argument that serves no purpose but to inflame the jury constitutes error. *Blue*, 189 Ill. 2d at 132. Even improper remarks do not merit reversal unless they resulted in substantial prejudice to defendant. "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123. We review the closing argument in its entirety and view the remarks in context in reviewing whether comments made during closing argument were improper. *Glasper*, 234 Ill. 2d at 204.

¶ 50 Turning to the merits, we conclude that the prosecutor's rebuttal argument neither disparaged defense counsel nor accused it of asking the jury to call on their biases in rendering a verdict. Rather, after reviewing the closing argument in its entirety, it is clear that the State's remarks were responsive to and invited by defense counsel's line of argument. As such, the State's comments were not error. See *Rader*, 178 Ill. App. 3d at 466 (noting that prosecution may respond to comments by defense counsel that are invited or provoked).

¶ 51 In defense counsel's closing argument, he first acknowledged that "most of the facts in this case are not in dispute," but urged the jury to "look[] deeper into these facts, look[] behind these facts, [at] what was happening with [defendant] at that time" in evaluating whether defendant had the intent to kill. Defense counsel argued that, although he "[didn't] know what she's thinking" when defendant went to the victim's apartment complex, he knew that she was unable to sleep that night, had worked seven days in a row while caring for her minor children, had recently ceased taking her anxiety medication and, earlier that year, had undergone cancer

surgery and radiation treatments. He also asserted that although he was not casting blame on the victim, "certainly the victim's actions had something to do with [defendant's] actions." He went on to assert that defendant was "entitled to [the members of the jury] looking at the evidence to determine whether that gives you reasonable doubt, and she's entitled to it not just because the law says she is, but she's entitled to it also because of the life that she led up to September 26, 2014, and the life she led after that day." It is clear that the State's remarks were aimed at countering the sympathy that defense counsel sought to garner in its closing remarks. To the extent that we would be inclined to find that the State's brief remark pertaining to a "20-year-old man on the south side of Chicago" was improper, such determination would not merit reversal because it did not substantially prejudice defendant. Further, the jury was instructed to disregard any portions of the closing arguments that were not based on the evidence, and the evidence of defendant's guilt was overwhelming. See *People v. Gonzalez*, 388 Ill. App. 3d 566, 597 (2008) (holding that prosecutor's comments were not of such magnitude that defendant was denied a fair trial where the evidence of guilt was overwhelming).

¶ 52 CONCLUSION

¶ 53 For the reasons stated, we affirm defendant's conviction of attempted murder.

¶ 54 Affirmed.