UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1130

September Term, 2016

YESSENIA FLORIDALMA ARGUETA AYALA

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: August 7, 2017

Appellant, Yessenia Floridalma Argueta Ayala, was convicted by a jury in the Circuit Court for Frederick County of two counts of child abuse in the second degree. The court sentenced appellant to two consecutive five-year terms in prison, but suspended all but ninety days of each sentence in favor of eighteen months of supervised probation. Appellant noted a timely appeal in which she presents one question for our review: was the evidence sufficient to sustain her convictions? For the reasons set forth below, we shall answer that question in the affirmative.

I.

BACKGROUND

Before recounting the facts of this case, it is important to note that the State contended below that it was appellant's boyfriend, Juan Argueta,[1] not appellant, who physically abused appellant's three-year old son, J.A. According to the State, appellant was guilty of the crimes for which she was convicted because she failed to intervene when she knew that Mr. Argueta was physically abusing J.A.

In 2014, appellant and Juan Argueta lived in Frederick County with Mr. Argueta's parents, Maria and Jose, along with J.A., and J.A.'s half-brother, who was an infant.[2] Jeanette Gemio began caring for J.A. in August 2014. She did so for one month. During that time, Ms. Gemio noticed no injuries to J.A.

[1] Appellant is now married to Juan Argueta.

[2] Mr. Argueta is not J.A.'s biological father; his biological father resides in El Salvador.

In September 2014, Brenda Aguilar began caring for J.A. while appellant was working. She provided this care at her (Ms. Aguilar's) home. Within the first few days of caring for J.A., Ms. Aguilar noticed a mark on J.A.'s right cheek. On the morning that she noticed the mark, appellant's boyfriend, Mr. Argueta, had brought J.A. to Ms. Aguilar's home. According to Ms. Aguilar, J.A. arrived "kind of crying, whimpering, and it looked like he had just been crying." When she later asked appellant about the mark, appellant explained that J.A. had fallen down some stairs. Ms. Aguilar photographed J.A.'s cheek that day, and the State introduced that photograph into evidence.

A few days later, J.A. arrived at Ms. Aguilar's home with a second injury, i.e., a mark near an eye that she photographed. Later, on October 24, 2014, Ms. Aguilar photographed injuries that she noticed on J.A.'s back. When Ms. Aguilar asked appellant about those injuries, appellant explained that it "had happened to [J.A.] in the bathtub." Ms. Aguilar further testified that on another occasion, J.A. arrived at her home with a bandage under his right eye. After one week, Ms. Aguilar removed the bandage and observed that the area looked "like it was hurt, red." Ms. Aguilar photographed the injury under J.A.'s right eye, and the State introduced that photograph into evidence. Appellant's explanation to Ms. Aguilar concerning the injury under J.A.'s right eye was that he had fallen in the bathroom.

On December 15, 2014, Ms. Aguilar observed injuries to J.A.'s head, on the left side of his hairline and chin, which she also photographed. When Ms. Aguilar asked appellant about these injuries, appellant claimed that J.A. had fallen down at the park. That same day, Ms. Aguilar observed injuries to J.A.'s penis, after he complained to her that he

was unable to go to the bathroom. When Ms. Aguilar went to the bathroom to assist J.A., she noticed that his penis was "purple, black." At that point, Ms. Aguilar contacted Ms. Gemio, the former day care provider, as well as an unidentified individual. The unidentified individual made an anonymous report to Child Protective Services ("CPS") to notify CPS of J.A.'s injuries.

Ms. Aguilar testified that none of J.A.'s injuries occurred while she was watching him. On cross-examination, Ms. Aguilar testified that J.A. would throw himself on the floor when appellant came to pick him up, but that he never hit his head on the floor while doing so.

On December 17, 2014, Shawn Burke, a social worker with CPS, responded to the anonymous report of child abuse. Upon arrival at appellant's home, Ms. Burke "immediately noted multiple injuries to [J.A.'s] face in various … stages of healing." Ms. Burke asked appellant to undress her children so that she could determine whether they had any other injuries. When J.A. was undressed, Ms. Burke noticed "deep purple bruising to the shaft of [J.A.'s] penis" as well as "patterned injuries to his lower back and his buttock." Ms. Burke next inquired as to the name of J.A.'s pediatrician. Appellant responded that it was a "Dr. Menocal." But as Ms. Burke attempted to contact Dr. Menocal for an evaluation of J.A., appellant admitted that Dr. Menocal was not J.A.'s doctor. At that point, Ms. Burke instructed appellant to bring the children to the Emergency Room at Frederick Memorial Hospital for evaluation. At the hospital, Ms. Burke took several photographs of J.A.'s injuries, which were admitted into evidence.

On December 18, 2014, Detective William Ollie, Jr. of the Frederick County Sheriff's Office interviewed appellant. A recording of the interview was played for the jury. During the interview, appellant told the detective that the bruises to J.A.'s face were caused by him falling down, and that the injuries to his back resulted from him falling in the toilet, but that she had not witnessed him fall. Appellant stated that one night she noticed the bruising to J.A.'s penis while bathing him, but that she did not know what happened to cause the bruising. She told the detective that she had asked Mr. Argueta, if he knew what had happened to cause the bruising to J.A.'s penis, and Mr. Argueta said that he did not know.

Dr. Karla Paylor, a pediatrician with the Child Advocacy Center of Frederick County, examined J.A. on December 23, 2014. Dr. Paylor observed that J.A. had "a lot of injuries," including bruises to his penis, neck, back, buttocks, legs and on both sides of his face; one was healing and one was "still pretty prominent." On January 8, 2015, Dr. Paylor examined J.A. in preparation for J.A.'s placement in a foster home, and she observed that most of his injuries were healing, except for two faint scars on his face, and the prominent injury on his right cheek. Dr. Paylor considered J.A.'s "constellation of injuries" to be "life-threatening," and she recommended placement in a safe environment. When Dr. Paylor examined J.A. again on April 9, 2015, all of his injuries had completely healed, except for the injury under his right eye.

Dr. Robert Paul Wack, an expert in child abuse, testified (based on his review of J.A.'s hospital records and the photographs of his injuries) that J.A.'s injuries were "the result of a[n] ongoing pattern of physical abuse," or, in other words, resulted from "non-

accidental trauma." Dr. Wack described his observations based on the photographs of the injury under J.A.'s right eye, as follows:

> So . . . one of the many things we look [for] when we see children with injuries that don't have obvious, obvious explanation is the pattern of the injury. And you can see that this injury has a very distinct shape to it. That doesn't, by itself, tell you exactly what caused that injury . . . but it does tell you what didn't cause that injury.
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> And so, you can see that . . . there's a roughly rectangular outline (under the right eye), and then there's a very deep area up top there that was the point of maximum force that caused the most tissue damage.
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> * * *
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> So, you can see here this area right here, that's the point of maximum impact. And, so, you know, was that an edge, is it a corner of something[?] But then you also see these lines here, which indicate that there, this is part of some object. But what it's not is it's not, you know, the corner of a piece of furniture. It's not, it's not the sidewalk. You know the sidewalks, impacts on the sidewalk leave very, well, not characteristic . . . but diffuse bruises, or diffuse abrasions.
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> **[E]ven though I can't say for sure what it is, I can tell you what it's not, and it's not, this is not the shape of an injury that's typically caused by kids running around, falling, and bumping into things.** Those, those, and if it was, then usually there's a very specific explanation . . . and usually that's very forthcoming, because it's an unusual incident.
>
> **So, the combination of the pattern of injury, the severity of the injury, and the lack of an obvious explanation for it, and the fact that it's very atypical relative to what we usually see with kids falling makes it a very highly suspicious injury**.
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> * * *
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> So, kids heal very, very quickly. You can have a pretty extensive abrasion or laceration, and it's substantially healed within a week or two. The fact that this area here, you can see that's still healing in there, that's what we call granulation tissue, that was pretty deep. That's a fairly significant injury, and he obviously did not receive any treatment, no stitches, you know, this is just healing . . . by itself.

That's a pretty significant injury, and if it's a month old then it was, it looked way, way worse when it first happened, which, again, speaks to the severity of the injury which would have had a very severe incident, a severe impact, which usually, you know, there's this, when this happened there was a lot of crying, there was a lot of blood, there was a lot of drama; those don't usually go unnoticed.

(Emphasis added.)

With respect to the other injuries to J.A.'s head and face, Dr. Wack testified:

So, you can see there's three things here that, that are of note. This is an old healing abrasion. You can see the, the skin is very pink. This used to look like this. This is still in the healing phase. It still has a, a big scab on it. And then you see a very large area of bruising here.

So, this is probably from the same incident, but, and it's a pretty big incident again, you know. So, this is, this is healed. This is probably, you know, depending on how deep it originally was [it] could be, you know a week, two to three weeks old. This is still healing . . . if these two things happened at the same time, this was way deeper.

But this yellow bruising here is a very large area of bruising, and a single impact. It would be hard to explain how one single fall would do that, again, absent some very dramatic mechanism of injury, fell out of a moving car, fell off a, you know, rocky cliff or something.

You know, this is not just a, a running around the house kind of injury; it's just too big, and it's too, it has too many different features, and it's, you know . . . the extent of the tissue damage is, is way out of line [with] what we usually see in the usual running around the house, or roughhousing with friends, or playing sports kind of injuries.

* * *

And the temple, this, this is a corner here. These, these angles here, these boney angles, these are the kind of corners that usually take the brunt of a fall. So, you see bruises when kids fall and hit their head. They, they cluster in particular areas, so, the corners of the temples right here, the cheekbones.

> So, again, this, the extent of this crossing, all these different planes of the skull argues very, very strongly against this being from a single fall. There's . . . something more going on here that distributes, because if, really at the end of the day, when you're talking about injuries to the human body, you're talking about energy being transferred to the body, and that's being more energy from the impact than the body can handle, and so it causes damage to the body.
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> This is a lot of energy over a large area, and it's, again, more than we typically [see] with a, a routine fall, or playing, roughhousing sort of thing.
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> * * *
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> I left out one other factor too, age of the patient too. So, age and developmental level, right? So, if this, if this, if he was a 16-year-old boy playing lacrosse with his friends, and he wasn't wearing a helmet, and somebody cracked him upside the head with a, with a lacrosse stick, that makes sense; that's a lot of energy, and a large area of distribution.
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> But, again, there's a story. There's a specific mechanism of injury to explain that pattern of damage, and this is not a 16-year-old boy playing lacrosse. And, so, that's, the age and the developmental level of the, of the patient also figures very prominently in how we assess the significance of a pattern of injury.

(Emphasis added.)

Dr. Wack further testified that the significant bruising to J.A.'s genital area was an extremely unusual injury that was unlikely to have resulted from routine activities engaged in by boys of J.A.'s age:

> The genital area, it's a protected area. It … lays between thighs, and it's set back from the plane of the abdomen. So, it, it's generally, in the course of routine play, and falls, and also children wearing clothes, diapers, underwear, pants, it's, it's pretty protected, the genitals.
>
> In particular, boys less so than girls. But, but, even with boys, typically, when they're wearing clothes, and they fall, it's extremely unusual to see sufficient injury to cause tissue damage, which is what this bruising is. And what bruises are, are, they are ruptured capillaries in the skin[.]

* * *

> So, so, what has happened here is this tissue here around the end of the penis, and the front of the scrotum here, has been subjected to some enormous amount of pressure that was so great that it caused all those capillaries and those tissues to rupture.
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> * * *
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> **So, this level of tissue injury, I can pretty categorically say we never see in the course of routine play, or, or routine activities in, in boys this age, again, absent a very specific mechanism of injury, and this would have caused an enormous amount of discomfort, which would have been a very notable thing in the household at the time it happened.**
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> So, it would . . . not [be] the kind of thing where, oh, they were roughhousing, he fell, bumped himself, and then they just kept playing, and nobody said anything to mom or dad. Not going to happen, not with this level of injury.
>
> Typically, we see this, this kind of bruising on the genitals from one of two mechanisms, non-accidental mechanism is pinching or sucking.

(Emphasis added.)

Appellant testified, with the assistance of a translator, that in October of 2014, she worked five days per week. On the days that she worked, she brought J.A. to Ms. Aguilar's home at 6:30 a.m. and after work, she picked J.A. up between 2:00 p.m. and 3:00 p.m. and returned home. She would then cook and clean. Mr. Argueta would return home from work between 6 and 7 p.m., at which time they ate dinner. J.A. went to bed between 8:30 and 9 p.m. While J.A. was at home, Mr. Argueta's mother would sometimes care for J.A.

Appellant testified that she had never seen Mr. Argueta abuse J.A., and she would never have allowed him to do so. Appellant admitted that she had spanked J.A. on his buttocks approximately five times, but that Mr. Argueta had never spanked J.A.

Appellant explained that J.A. sustained the injury under his right eye when he slipped, fell, and hit his face on the steps to their shower, while running into the bathroom one morning. She testified that the other injuries to J.A.'s head and face occurred when he "supposedly" fell, but that she did not see him fall. Appellant noticed bruising on J.A.'s penis one night while bathing him. She stated that she had touched the bruise on his penis and asked him if it hurt, and he replied that it did not. Appellant considered taking J.A. to the doctor for the injury to his penis, but she "was afraid they would think that [she] was the one who did that to him."

II.

DISCUSSION

A. Standard of Review

"The test of appellate review of evidentiary sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Donati v. State*, 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014) (citations and internal quotation marks omitted). In applying this test, an appellate court "defer[s] to any possible reasonable inferences [that] the trier of fact could have drawn from the ... evidence[.]" *Jones v. State*, 440 Md. 450, 455 (2014) (citation and quotation marks omitted). "We do not re-weigh the evidence, but we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 534 (2003) (citation and internal quotation marks omitted). Our review of

the evidence is the same for all criminal cases, "including those resting upon circumstantial evidence, since, generally, proof of guilt based in whole or in part on circumstantial evidence is no different from proof of guilt based on direct eyewitness accounts." *Id.*

B. Analysis

Appellant claims that the evidence was insufficient to sustain her convictions because the State failed to establish that she knew that her son was being abused yet failed to intervene to prevent it. The State argues that the evidence was sufficient to sustain appellant's convictions because a rational trier of fact could have concluded that appellant was aware that her son was being abused, that she did nothing to stop further abuse or to seek medical treatment for J.A.'s injuries, and that her failure to act resulted in further harm to him.

Appellant was convicted of second-degree child abuse under Maryland Code (2002, 2012 Repl Vol., 2016 Supp.), § 3-601(d) of the Criminal Law Article ("C.L."), which provides:

> (d) Second-degree child abuse. – (1) (i) A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause abuse to the minor.
>
> (ii) A household member or family member may not cause abuse to a minor.
>
> (2) Except as provided in subsection (c) of this section, a person who violates paragraph (1) of this subsection is guilty of the felony of child abuse in the second degree and on conviction is subject to imprisonment not exceeding 15 years.

"Abuse" is defined as "physical injury sustained by a minor as a result of cruel or inhumane treatment or as a result of a malicious act under circumstances that indicate that

the minor's health or welfare is harmed or threatened by the treatment or act." C.L. § 3-601 (a)(2).

A parent's failure to seek prompt medical treatment for a child, causing the child to sustain further injury, constituted "cruel or inhumane treatment." *See State v. Fabritz*, 276 Md. 416, 425-26 (1975). In *Fabritz*, a mother failed to seek medical attention for her daughter because she was too ashamed of the bruises on the child's body that were caused by a severe beating that the child suffered while in the custody of caregivers. *Id*. at 418. The child ultimately lost consciousness and died from her injuries. *Id.* at 418-19.

The Court of Appeals rejected Fabritz's argument that the "gist of the statutory offense of child abuse is not cruel or inhumane treatment but rather the infliction of physical injuries upon a child as a result of such treatment," and, therefore, her failure to obtain medical treatment for her daughter's injuries was not punishable as child abuse. *Id.* at 421. In upholding Fabritz's conviction under Md. Code (1971 Repl. Vol., 1975 Cum. Supp.), Article 27, § 35A, the predecessor to C.L. § 3-601, the Court observed that in the 1973 amendment to the child abuse statute, the Legislature "plainly intended to broaden the area of proscribed conduct punishable in child abuse cases." *Id*. at 423-24. The Court explained:

> In making it an offense for a person having custody of a minor child to "cause" the child to suffer a "physical injury," the Legislature did not require that the injury result from a physical assault upon the child or from any physical force initially applied by the accused individual; it provided, instead, in a more encompassing manner, that the offense was committed if physical injury to the child resulted either from a course of conduct constituting "cruel or inhumane treatment" or by "malicious act or acts."

Id. at 424.

In *Degren v. State*, 352 Md. 400 (1999), the Court of Appeals considered whether the defendant could be convicted of child sexual abuse under Md. Code (1957, 1996 Repl. Vol.), Article 27, § 35C(a)(6)(i), the predecessor to C.L. § 3-602, for failing to intervene while she watched her husband and another man sexually molest a child whom she had a duty to protect. *Degren*, 352 Md. at 405-08. Degren argued that she had been improperly convicted because the statute limited what constituted sexual abuse to "affirmative deeds." *Id*. at 420. The Court rejected Degren's argument and affirmed her convictions, concluding that such a construction of the statute "defies common sense, logic, and the purpose and goals of the child abuse statute and its amendments." *Id*. The Court explained:

> [T]aking into consideration the purpose of the child abuse statute, the amendments in which the Legislature generally expanded the scope of liability and actions constituting child abuse, this Court's holdings in *Fabritz* and *Pope*[*v. State*, 284 Md. 309 (1979)][3], and the modern trend in broadly recognizing and punishing all forms of child abuse, we believe the definition of sexual abuse in [Art. 27, § 35C(a)(6)(i)] contemplates not just an affirmative act in directly molesting or exploiting a child, but one's omission or failure to act to prevent molestation or exploitation when it is reasonably possible to act and when a duty to do so . . . exists.

Id. at 424-25 (footnote and citation omitted).

Appellant contends the evidence in this case was insufficient because, unlike *Degren*, there was no evidence that she watched the abuse, or that she even knew that her son was being abused, and that she failed to intervene to prevent it. This argument

[3] In *Pope*, 284 Md. at 328-29, the Court of Appeals determined that Pope's failure to intervene to stop the mother of a three-month old child from abusing the child, would constitute felony child abuse. Nevertheless, Pope's conviction was reversed because, under the statute, she was not the person responsible for the care of the child. *Id*. at 330.

overlooks the fact that whether appellant knew or had reason to know that J.A.'s injuries were the result of abuse need not be proven directly, but may be inferred from the evidence. *See State v. Albrecht*, 336 Md. 475, 479 (1994)(noting that a verdict must be supported by sufficient evidence "that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt").

The evidence viewed in the light most favorable to the State demonstrated that J.A.'s injuries were clearly visible and were sustained over a protracted period of time. This was shown by Ms. Burke's testimony that the first time she saw J.A., she "immediately noted multiple injuries to [J.A.'s] face in various . . . stages of healing." Moreover, Ms. Aguilar testified that J.A. arrived at her home on multiple occasions over the course of several months with various injuries, including a cut under his eye that was so deep that it still had not healed after being covered with a bandage for a week. According to the State's medical evidence, J.A.'s "constellation of injuries" all over his body were "life-threatening." The jury could have legitimately inferred from the evidence just summarized that once she learned of the first injuries, if appellant had reported the abuse to medical care providers, subsequent injuries to J.A. could have been prevented.

Appellant's various explanations as to how J.A. received his injuries were all contradicted by the State's experts. In determining whether appellant knew of J.A.'s abuse, the jury could legitimately have found that her explanations were bogus and, rather than intervening to protect her child from further abuse, she invented false explanations to protect J.A.'s abuser.

It is important to recall that the jury heard expert testimony from Dr. Wack who opined that J.A.'s injuries were "all the result of a[n] ongoing pattern of physical abuse." According to Dr. Wack, J.A.'s injuries were "very atypical" for a child of his age, based on the pattern of J.A.'s injuries, the severity of the injuries, and the lack of an obvious explanation for them. According to appellant's own testimony, she declined to seek treatment for the injury to J.A.'s penis because she was afraid that "they would think that [she] was the one who did that to him." We conclude that the State introduced sufficient evidence from which a rational trier of fact could find that appellant's failure to prevent the abuse of her son or to obtain medical treatment for his injuries constituted "cruel or inhumane treatment" or "malicious acts" within the meaning the statute.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.