UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0123

September Term, 2014

DAVID HIBBARD

v.

STATE OF MARYLAND

Woodward,
Kehoe,
Arthur,

JJ.

Opinion by Woodward, J.

Filed: July 28, 2015

Following a bench trial in the Circuit Court for Baltimore County, appellant, David Hibbard, was convicted of two counts of neglect of a minor, two counts of reckless endangerment, and one count of trespassing on posted property. Appellant was sentenced to 90 days for the trespass count, and five years for each of the remaining counts, all to run concurrently. On appeal, appellant presents four questions for our review, which we quote:

> 1. Was the evidence sufficient to establish that [appellant] is guilty of neglect of a minor?
>
> 2. Was the evidence sufficient to establish that [appellant] is guilty of reckless endangerment?
>
> 3. Was the evidence sufficient to establish that [appellant] is guilty of trespassing on posted property?
>
> 4. Must the convictions for reckless endangerment and for neglect of a minor be merged for sentencing purposes[?]

For the reasons that follow, we shall answer yes to all four questions. Accordingly, we shall vacate the sentences on the convictions for neglect of a minor and otherwise affirm the judgments of the circuit court.

BACKGROUND

Appellant is married and has two children, Julianna (age 4) and Victoria (age 2). Appellant also has a step-daughter, Chloe (age 12). Chloe is blind in one eye and is only able to see about 15 feet in front of her with the other eye. She wears glasses.[1]

[1] It is not clear from the record whether Chloe can see 15 feet in front of her unassisted by her glasses, or whether she requires her glasses to see that distance.

On June 29, 2013, appellant called his wife at work and asked if he could take the three children to Loch Raven Reservoir for a picnic. His wife asked that the outing be scheduled for another day because she was working and could not join them; she also thought that it would be too much for one adult to be in charge of three children, including two toddlers. Despite this request to schedule the trip for another day, appellant packed a picnic and went to the reservoir with the children, who were wearing bathing suits.

Chloe, the oldest child, testified that appellant took her and her half-sisters to the reservoir to "sit and feed the ducks." She was not wearing her glasses that day because they were broken. Chloe testified that, although appellant told them not to go in the water, she went in anyway, because Julianna, then three years-old, and the dog they had brought with them were going out into the water. Chloe held Julianna to her chest and walked out through waist-deep water to an island. Julianna, who, according to her mother, was learning to swim, was not wearing any type of floatation device. When they got to the island, they played in the sand for about fifteen minutes while appellant and Victoria remained on the shore, feeding the ducks.

Appellant told Chloe and Julianna to come back, and they started back to the shore, Chloe again holding Julianna. When asked what happened next, Chloe responded, "[w]e were walking and the slope kind of catched [sic] us." She explained that the water was much deeper than when they were walking out to the island, and that it was over her head. She went underwater twice. According to Chloe, Julianna didn't go underwater, but was

able to tread water. Chloe called out for appellant, saying "come help me." Appellant said "hold on." Chloe went underwater again, and the next thing she remembered was being on a boat with her sister and two park rangers. She did not recall being lifted onto the boat.

Patrick Lykens was walking on a path at Loch Raven Reservoir with his now wife the same day. They walked at the reservoir frequently. He noticed something in the water and they walked over to investigate. As they got closer, they realized that there was a dog in the water, and there were people out on the island, although he could not tell how many. Lykens stated that it was highly unusual to see people in the water and that he had never seen anyone swimming there. Near the shore was a man, whom Lykens identified as appellant, playing in knee-deep water with a small child. He described how appellant was "playing with her at the edge of the water like a parent with a child like in a baby pool, duck them a little bit in the water and splash."

Lykens asked appellant how the people got out to the island. Appellant told Lykens they had walked out on a sandbar, and pointed to where it was. Lykens could not see a sandbar. Lykens testified that "[t]here are quite a bit of those signs that say no swimming" at the reservoir, and that he saw a "no swimming" sign in the area where the appellant was with his children.

While Lykens and appellant continued "chit-chatting," two people started to come back to shore. Lykens could not remember whether they came back on their own or whether they were told to do so by appellant. They appeared to be coming back on the sandbar that

appellant had pointed out. While they were coming back to shore, appellant was "mostly" facing Lykens, with his back or side to the girls. Lykens indicated that appellant's focus was "between us."

Lykens testified that on the way back, "the girl . . . started to go down and have trouble walking across that thing." The girl called for help two times, and Lykens indicated "there might have been a third time but definitely two." He testified that, "[s]he said help and then I recall the [appellant] turning around and saying what and she said help again and he was like what. I guess it appeared he was waiting for her to say what she needed help with and not just help." Lykens saw both girls go under the water and come back up.

Appellant handed Victoria to Lykens, emptied his pockets, walked out into the water, and started swimming "real fast." A patrol boat got to the children before appellant did. Appellant came back to shore, and the boat brought the children to shore. Lykens handed Victoria back to appellant. Appellant re-entered the water with Victoria and was told to get out of the water several times by the officer.

Officer Hiedi [sic] Greenleaf of the Natural Resources Police was on boat patrol at the Loch Raven Reservoir that day. She observed an adult male, later identified as appellant, standing ankle-deep in the reservoir water, where swimming is not allowed. She also noticed what appeared to be a red life jacket approximately a hundred yards offshore. She piloted the boat toward appellant to tell him to get out of the water. As she got closer, she realized that the red object was actually a child or a person in distress. She directed the boat

toward the person in distress, and realized it was a child, "waving their arms, kind of flailing." The child was not wearing a life jacket, but a red "onesie."

Officer Greenleaf handed the controls over to her partner, Officer Janos,[2] and went to the front of the patrol boat. As they got closer, she observed not one, but two children in the water. Chloe was submerged in the water, attempting to hold Julianna above the water**.** By the time the patrol boat got to them, both children were submerged under the water, arms raised in the air, "kind of just floating there," and were not breathing.

Officer Greenleaf grabbed Julianna in one hand, and Chloe in the other. She lifted Julianna into the boat, but had trouble getting Chloe onto the boat. By that time, appellant, whom Officer Greenleaf had observed "slowly walking out" into the water as the patrol boat was approaching the children, swam up to the boat. Officer Janos instructed appellant to help get Chloe into the boat. According to Officer Greenleaf, appellant responded, "I can't" and started to swim back toward shore. Officer Janos and Officer Greenleaf lifted Chloe onto the boat.

Officer Greenleaf described Julianna as being "bluish-gray" when they got her onto the boat, and was shaking, shivering and "very hypothermic." Chloe was "semi-conscious," and was not responding to Officer Greenleaf's calls to wake her up. Officer Greenleaf stated

[2] Officer Janos' first name is not apparent from the record.

that Chloe "couldn't tell me her name. She couldn't talk. She was breathing but just slow breaths. She was not responding to anything."

The patrol boat took the children to shore, where appellant was changing into a dry t-shirt. Officer Greenleaf told appellant to give her the shirt and wrapped it around Julianna, who was shaking and blue. Chloe was still not responding and they were trying to wake her up. Eventually, Chloe sat up, coughed a little bit, and was assisted out of the boat, toward the emergency personnel that had arrived on the scene.

Once the children were turned over to the paramedics, Officer Greenleaf tried to get appellant's attention. She indicated that appellant "kept walking away, talking on the cell phone. He was not really paying attention to anything that was going on." She testified that appellant "never asked about the children. He never really looked in their direction. He never made sure that they were okay. He just kind of was on his cell phone and talking to his spouse, I guess."

Officer Greenleaf made appellant sit down so she could get his information, and related that appellant asked if the whole situation was going to take long, because the mosquitos were biting him and Victoria. Chloe and Julianna were examined by the paramedics and released to their mother, who had arrived on the scene.

Officer Greenleaf explained that people are not permitted to swim in the water at the reservoir, stating that "[i]t is a very dangerous reservoir. It is not only drinking water but there are a lot of underwater obstacles, as well." Signs indicating that no swimming is

allowed are clearly posted, including a "very large" sign in the area where appellant was in the water with his children.

According to appellant's testimony, they were going to the reservoir to have a picnic and feed the ducks. He admitted that taking the three girls to the reservoir was a "very big responsibility." He told Chloe that she could feed the ducks with Julianna, but testified that he told the children, "do not go in the water for any reason." He did not see any no "trespassing signs" or "any types of signs or postings," but cited "safety concerns" for the reason why he told the children not to go into the water, explaining, "I am very safety conscious about my daughters. I love them to death and don't want them to have anything happen negatively."

Appellant testified that Chloe disregarded his instructions and went into the water. Julianna followed her. When he saw them in the water, he "expressed concern to them to not be in the water," but allowed them to wade up to their ankles or shins. When they went farther out, he told them to come back. Chloe did not come back right away, but continued walking toward an island that was out in the water. He told her to come back a second time.

As this situation was unfolding, appellant was talking to Lykens. He heard Chloe yell for him and he asked her "what was going on." He went into the water when Chloe called for help the second time, after asking Lykens to watch Victoria and taking his cell phone and keys out of his pocket.

At the same time, the patrol boat was approaching at "a fair clip of speed." According to appellant, when the boat stopped, its wake "overtook the children." Officer Greenleaf reached down and pulled Julianna into the boat. Appellant tried to help Officer Greenleaf get Chloe into the boat by lifting her but was unable to do so. Chloe was brought onto the boat. Appellant was told he could not get into the boat, and was instructed to swim to shore.

When appellant got back to shore, he called his wife to explain that "we had, Chloe and Julianna had an accident at the beach." He testified that he did not have any contact with the children immediately after the accident, because the officers would not allow him to approach the patrol boat or get into the water.

Appellant denied playing in the water with Victoria and testified that she was wet only because he was wet and had been holding her. Because they were both wet, the mosquitoes on the beach were attacking them. Appellant did not recall seeing Chloe and Julianna on the island, and did not recall telling Lykens that the children got to the island by walking on the sandbar. He stated that he did not know whether or not there was a sandbar in the water.

When asked if there was anything else he could have done once he heard Chloe's cry for help, appellant answered:

> You know, I could have been firmer with them and stricter, as far as, you know, explaining to them the hazards. And you know I wouldn't want anything like this to have happened. I fault myself for not being

> stronger that time. You know, being firmer and saying no, you are not going there, you are not doing that and if you do there is going to be consequences. I wanted it to be a fun day. I let things go that I shouldn't have.

As noted, the trial court found appellant guilty of two counts of neglect of a minor, two counts of reckless endangerment, and one count of trespassing on posted property, finding as follows:

> All right. I have had an opportunity to listen carefully to the testimony is this case. I am persuaded that [appellant] very much allowed the children to play in the water. I think he went there to play in the water and that was the reason he set up the picnic blanket where it was. He played with the one daughter and allowed Chloe and Julianna to go a hundred yards out to an island in the middle of the water where no swimming signs are posted, where the danger is apparent.
>
> I am also persuaded that when it became apparent that the girls were in trouble, he did not respond immediately to save them, that his first response was to think of himself.
>
> Therefore, I am persuaded that his conduct does meet the requirements of the law for both the neglect of a minor and the reckless endangerment charges because his failure to provide the proper supervision of these children caused them to be in the water, in the first place, which placed them at a substantial risk of harm and his failure to respond appropriately when the emergency became apparent, also created in itself a substantial risk of harm to both minors, almost caused their death. And that the conduct also meets the requirements of the law with regard to reckless endangerment.
>
> The trespassing, as I said, if I thought he only went into the water to save somebody else, I would - - there is no way I would find him guilty of that but I am persuaded that he was in the water playing with the other daughter while these two, with his permission, had gone farther out. Therefore, [appellant] is guilty of all charges.

Additional facts will be introduced in the discussion as they become relevant.

DISCUSSION

1. Sufficiency - Neglect of a Minor

a. Parties' Contentions

Appellant contends that the evidence was insufficient to convict him of neglect of a minor because he did not permit the children to go swimming, and what happened was an accident. In addition, appellant argues that as soon as he became aware that the children were in trouble, he acted as quickly as he could to render assistance.

The State responds that the evidence that appellant did not immediately respond to Chloe's cries for help was sufficient to support the court's finding that appellant intentionally failed to come to the assistance of Chloe and Julianna.[3] We conclude that the evidence was sufficient to support the convictions for neglect of a minor.

b. Standard of Review and Applicable Law

The Court of Appeals has summarized the standard of review for sufficiency of the evidence in a bench trial as follows:

[3] The State asserts that the trial court found appellant guilty of two separate instances of criminal conduct, i.e., that the convictions for reckless endangerment were based solely on permitting the children to be in the water , and the convictions for neglect of a minor were based solely on appellant's failure to come to the assistance of the children when the emergency became apparent. As we discuss, *infra*, we do not agree that the court made such a distinction.

> In reviewing the sufficiency of the evidence to sustain a criminal conviction, it is the duty of this Court to determine 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. We do not measure the weight of the evidence; rather, our concern is only whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt. The judgment of the circuit court will not be set aside unless clearly erroneous, with due regard given to the opportunity of the trial court to judge the credibility of the witnesses.

Taylor v. State, 346 Md. 452, 457 (1997) (citations and internal quotation marks omitted).[4]

Appellant was convicted under Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C.L."), § 3-602.1(b), which provides that "[a] parent, family member, household member, or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not neglect the minor." The statute defines "neglect" as "the intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor that creates a substantial risk of harm to the minor's physical health or a substantial risk of mental injury to the minor." C.L. § 3-602(a)(5)(i). "The question of one's state of mind, or his intention, at a particular time is one of fact, and is subjective in nature. Therefore it must be determined by a consideration of his acts, conduct and words." *State v. Martin*, 329 Md. 351, 363, *cert. denied* 510 U.S. 855 (1993) (citations and internal quotation marks omitted).

[4] The same standard of review applies to issues 2 and 3, below.

c. Analysis

In closing argument, the State argued that "the neglect is that [appellant] took the kids [to the reservoir] and he wasn't watching them and he didn't help them when something happened. He was in charge of giving them what they needed." The court agreed on this point, finding that appellant allowed the children to play in the water and go out to the island, despite the posted warnings, and that he did not respond immediately to save them when it the emergency became apparent. The court then concluded that this conduct met the requirements for neglect of a minor, as well as for reckless endangerment.

Viewing the evidence in the light most favorable to the State, as we must, we conclude that the evidence was sufficient to support the convictions for neglect of a minor. "No swimming" signs were posted, warning of potential danger, and appellant's own testimony established that he recognized that it was unsafe for the children to be in the water. Nonetheless, his conduct indicated that he intentionally permitted them to be in the water and go 100 yards from the shore without him, while he played with Victoria and "chit-chatted" with Lykens, with his back or his side to the girls in the water.

That appellant failed to respond appropriately to the child's cries for help, when he had notice that the children were in unsafe waters, also constituted neglect within the meaning of the statute. The evidence presented at trial was that, when appellant heard Chloe cry for help, his response was not to enter the water immediately, but, incredulously, to ask "What?" not once, but twice. Furthermore, according to Officer Greenleaf's testimony,

appellant was just "slowly walking out" into the water while his children were either submerged or flailing about in the water. Therefore, the court's finding that appellant's conduct in the face of apparent danger to the children constituted an intentional failure to provide the necessary assistance for the physical needs of a minor, placing them at substantial risk of harm, was not clearly erroneous.

2. Sufficiency - Reckless Endangerment

a. Parties' Contentions

Appellant argues that the evidence was insufficient to convict him of reckless endangerment because his conduct was not "so reckless as to constitute a gross departure from the standard of conduct that a law abiding citizen would observe." In support of his argument, appellant submits that he did not give the children permission to swim, that the children were walking on a surface to reach the island, and that he was close enough to the children that they could hear each other.

The State responds that the evidence that appellant was aware of and allowed Chloe to carry Julianna through the reservoir water to an island approximately 100 yards from short, despite warnings to the contrary and without knowing the depth of the water or the configuration of the sandbar, was sufficient to support the conviction. We conclude that the evidence was sufficient to support the convictions for reckless endangerment.

b. Applicable Law

Appellant was convicted under C.L. § 3-204, which states, in subsection (a), that: "[a] person may not recklessly: (1) engage in conduct that creates a substantial risk of death or serious physical injury to another . . . ." The reckless endangerment statute was enacted to deter reckless behavior that could cause serious injury or death. *Jones v. State*, 357 Md. 408, 426 (2000). "It is the reckless conduct and not the harm caused by the conduct, if any, which the statute was intended to criminalize." *Minor v. State*, 326 Md. 436, 442 (1992).

The elements of reckless endangerment are: "'1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly."' *Mouldon v. State*, 212 Md. App. 331, 355-56 (2013) (citation omitted).

c. Analysis

The evidence established that, although he did not want the children to approach the water "for safety concerns," appellant permitted Chloe, who was blind in one eye and without glasses to assist vision in the other, to carry three-year-old Julianna into the water to an island that was 100 yards from the shore. The evidence further established that "no swimming" signs were posted in the area and that Julianna, who was only just learning to swim, was not wearing a floatation device. Additionally, while Chloe and Julianna went out to the island, appellant remained near the shore, as far away as the length of a football field, where his

attention was focused on playing with Victoria and talking with Lykens. Finally, when Chloe called for help, appellant failed to act immediately, or even reasonably.

As the Court of Appeals has explained, whether the defendant acted recklessly

> is not . . . a subjective determination predicated upon [the defendant's] actual perception or state of mind as to whether his conduct created a substantial risk of death or physical injury. In other words, it is not the accused's subjective expectation of what his risk-creating conduct would entail that is determinative. . . . [G]uilt under the statute does not depend upon whether the accused intended that his reckless conduct create a substantial risk of death or serious injury to another. **The test is whether the [defendant's] misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish.**

Minor, 326 Md. at 443 (emphasis added). Viewed as a whole, the evidence at trial was sufficient to support the court's finding that appellant's conduct met the requirements of the law with respect to reckless endangerment.

3. Sufficiency - Trespassing

a. Parties' Contentions

Appellant maintains that the evidence was insufficient to convict him of trespass on posted property. Specifically, he asserts that "'no swimming' does not mean the same as 'no trespassing,'" and that a "no swimming" sign, assuming there was one, was insufficient to inform him that entering the water was illegal. Appellant also argues that he was not swimming, but only wading in the water, and therefore, a "no swimming" sign was

insufficient to advise him that he was not permitted to touch the water. Finally, appellant asserts the evidence was insufficient because there was no testimony or evidence regarding the location, size, color or wording of the signs.

The State counters that the testimony of Lykens and Officer Greenleaf established that signs prohibiting swimming were posted at the reservoir, including one "very large" sign where the incident occurred, thus establishing constructive notice. The State further argues that the evidence permitted the court to infer that appellant was not an inadvertent trespasser who believed he had permission to enter the water. We conclude that the evidence was sufficient to support the conviction for trespassing on posted property.

b. Applicable Law

C.L. § 6-402(a) provides:

> (a) A person may not enter or trespass on property that is posted conspicuously against trespass by:
>
> (1) signs placed where they reasonably may be seen; or
>
> (2) paint marks that:
>
> (i) conform with regulations that the Department of Natural Resources adopts under § 5-209 of the Natural Resources Article; and
>
> (ii) are made on trees or posts that are located:
>
> 1. at each road entrance to the property; and
>
> 2. adjacent to public roadways, public waterways, and other land adjoining the property.

c. Analysis

The trespass statute requires only that signs indicating a prohibition against trespassing be posted "where they may reasonably be seen[.]" Contrary to appellant's

suggestion, there is nothing in the statute or Code of Maryland Regulations (COMAR) 08.01.05.01, to which appellant cites, establishing size, color or wording requirements for signs. COMAR sets forth specific regulations only for property that is posted by paint marks instead of signs. The only requirement in the regulation for "no trespassing" signs mirrors C.L. § 6-402 in that they must be placed "where they reasonably may be seen." *Compare* COMAR 08.01.05.01 with C.L. § 6-402.

The fact that there were "no swimming" signs clearly posted was established by the testimony of both Officer Greenleaf and Lykens that signs that said "no swimming" were posted at the reservoir, and that there was a "very large" "no swimming" sign in the area where appellant and the children were in the water. Accordingly, the evidence was sufficient to establish that signs prohibiting swimming were posted where they reasonably could be seen.

Appellant's argument that "no swimming" does not mean the same thing as "no trespassing" is without merit. As we have held, "conspicuously posted signs indicating that the presence of unauthorized persons is proscribed satisfies the statute. The use of the precise wording, 'No trespassing' or 'Trespassers forbidden' is not mandated. It is enough if the message on the posted signs warns against trespassing irrespective of the wording employed." *Monroe v. State*, 51 Md. App. 661, 665 (1982). Here, a sign indicating "no swimming" was sufficient to inform appellant that the water was unsafe, and that swimming or playing in the water was unauthorized.

4. Merger

a. Parties' Contentions

Appellant's last argument is that his convictions for reckless endangerment and for neglect of a minor should have been merged. He maintains that, because the evidence to prove both crimes arose from the same incident, the rule of lenity requires that any ambiguity as to whether separate punishments are permitted should be resolved in favor of merger. Alternatively, appellant argues that the principle of fundamental fairness requires merger.

The State responds that the trial court's ruling indicates that the reckless endangerment and neglect of a minor convictions were based on separate instances of criminal conduct, and as such, the sentences do not merge. The State asserts that allowing the children to go into the water was the conduct upon which the reckless endangerment conviction was grounded, and not responding immediately when it became apparent that they were in trouble formed the basis for the neglect of a minor conviction. The State further responds that, even if the same facts gave rise to both convictions, C.L. § 3-602.1 permits separate sentences. We conclude that the sentences for neglect of a minor and reckless endangerment should have been merged.

b. Applicable Law and Standard of Review

Merger of convictions for sentencing purposes is derived from the protection against double jeopardy afforded by the Fifth Amendment of the United States Constitution and Maryland common law, and protects criminal defendants from multiple punishments for the

same offense. *Brooks v. State*, 439 Md. 698, 737 (2014). As we observed in *Britton v. State*, 201 Md. App. 589 (2011):

> [W]hen the trial court is required to merge convictions for sentencing purposes but, instead, imposes a separate sentence for each unmerged conviction, it commits reversible error. . . . [S]uch an error implicates the illegality of imposing multiple sentences ... for the same offense. . . . [T]he result is the imposition of a sentence not permitted by law.

Id. at 598-99 (internal quotation marks and citations omitted).

c. Analysis

Appellant urges two grounds for merging his convictions for neglect of a minor and reckless endangerment; the rule of lenity and the principle of fundamental fairness. We need not address the merits of these arguments, however, because it is clear that the legislature intended that the convictions in the instant case should have been merged.

Subsection (d) of C.L. § 3-602.1, the neglect of a minor statute, provides that "[a] sentence imposed under this section shall be in addition to any other sentence imposed for a conviction arising from the same facts and circumstances *unless the evidence required to prove each crime is substantially identical*." (Emphasis added). Thus, it is clear from the language of the statute that the legislature did not intend to establish a separate penalty for a conviction for neglect of a minor where the conviction is based on evidence that is substantially identical to evidence required to prove another crime.

Our review of the history of the statute confirms our reading of the statute. When the law was first introduced, the original sentencing provision permitted separate sentences for

neglect of a minor and another crime based on the same act. *See* 2011 Md. Laws, Chs. 398, 399 (effective October 1, 2011). The original language read as follows:

> (1) A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing the violation of this section.
>
> (2) This section may not be construed to prohibit the prosecution for a person for a violation of § 3-601[5] of this subtitle for events arising from the same facts and circumstances as could be charged as a violation of this section when the events result in physical injury to a minor.

The above language was stricken from the bill, however, and an amendment to add the current sentencing provision, providing for merger of crimes proven by "substantially identical" evidence, was passed. The Floor Report for Senate Bill 178 explains the purpose of the amendment and offers an example of when offenses would merge:

> [The amendment] [p]rovides that a sentence imposed for child neglect shall be in addition to any other sentence imposed for a conviction arising from the same facts and circumstances unless the evidence required to prove each crime is substantially identical. (So, for example, a conviction for neglect would merge into a conviction for abuse arising from the same facts).

Senate Judicial Proceedings Committee, Floor Report, Senate Bill 178, p. 2 (2011).

The Floor Report also notes that "[a]ccording to testimony, Maryland is the only state in the country that does not criminalize child neglect. Although some cases of child neglect

[5] C.L. § 3-601 prohibits abuse of a child.

may be prosecuted under other statutes, many fall through the cracks, allowing children to be placed at substantial risk of harm." *Id.* at 3.

Thus, it is clear from the legislative history that (a) the purpose of enacting C.L. § 3-602.1 was to establish criminal sanctions for conduct that could not be prosecuted under other criminal statutes, and (b) the legislature did not intend to create a separate penalty for child neglect in addition to the penalty for another conviction based on the same or substantially similar evidence. Moreover, the example offered in the Floor Report makes it clear that, where evidence required to prove each crime is substantially identical, the conviction for neglect of a minor merges into the other conviction.

In support of its argument that the convictions should not merge, the State posits that the court found appellant guilty of separate instances of criminal conduct, i.e. that allowing the children to go into the water was the basis for the reckless endangerment conviction, and that failing to respond immediately to save them was a separate act that gave rise to the neglect conviction. We disagree. The court's findings, which it articulated on the record, clearly show that the court found appellant guilty of each crime based on the same evidence. We repeat the court's findings with respect to these two convictions:

> Therefore, I am persuaded that his conduct does meet the requirements of the law for both the neglect of a minor and the reckless endangerment charges because his failure to provide the proper supervision of these children caused them to be in the water, in the first place, which placed them at a substantial risk of harm and his failure to respond appropriately when the emergency became apparent, also created in itself a substantial risk of harm to both

> minors, almost caused their death. And that the conduct also meets the requirements of the law with regard to reckless endangerment.

The trial court did not separate appellant's conduct into that which supported the neglect convictions and that which supported the convictions for reckless endangerment. Accordingly, because the evidence required to prove each crime was substantially identical, the convictions for neglect of a minor should have merged into the convictions for reckless endangerment for sentencing purposes.

SENTENCES ON CONVICTIONS FOR NEGLECT OF A MINOR VACATED. JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY OTHERWISE AFFIRMED. COSTS TO BE PAID 75% BY APPELLANT AND 25% BY BALTIMORE COUNTY.