UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0128

September Term, 2014

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KAYLA M. BARKER

v.

STATE OF MARYLAND

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Graeff,
Kehoe,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

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Opinion by Kehoe, J.

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Filed: August 10, 2015

Following a jury trial in the Circuit Court for Harford County, a jury convicted appellant, Kayla M. Barker, of first-degree child abuse and neglect of a minor. The trial court sentenced her to 25 years in prison on the child abuse charge, along with a concurrent five years on the neglect charge. Thereafter, appellant timely noted this appeal.

Appellant presents the following questions for our consideration:

1. Did the circuit court err in admitting "other crimes" evidence?

2. Is the evidence sufficient to sustain the convictions?

For the reasons that follow, we shall affirm the judgments of the trial court.

## FACTS AND LEGAL PROCEEDINGS

Appellant is the biological mother of R.S. and C.W. In April 2012, appellant lived with the two children and her boyfriend, Ed Moore, in a house rented from the grandmother of appellant's ex-boyfriend, R.S.'s father.[1] At the time, R.S. was approximately eight months old and C.W. was approximately three years old.

Moore testified that R.S., apparently a fussy baby, slept in a crib in the living room of the house appellant and Moore shared, the room the farthest away from the master bedroom.[2] On occasion, appellant became frustrated with R.S.'s frequent crying, and Moore

[1]We adopt the parties' method of identifying the minor children by their initials. Moore is not the father of either child.

[2]Moore readily admitted to prior convictions for theft and prescription fraud. He also acknowledged that he was on probation at the time of R.S.'s injuries, and knew he could go back to jail if he got into further trouble. He was also aware that his attempts at gaining more visitation with his own son from a previous relationship would be derailed if the investigation into abuse against R.S. implicated him.

had observed her pulling the child's arm, placing her in her crib for up to 16 hours per day, and shutting their bedroom door to drown out the sounds of her cries. He had also witnessed appellant push R.S.'s legs down and pinch her inner thighs when the baby squirmed during a diaper change, which caused R.S. to become "hysterical." On April 16, 2012, Moore observed fading bruises on R.S.'s head and new bruises beginning to develop under her eye. He had previously seen bruises on R.S.'s arms and legs, but he did not believe it was his place to advise appellant how to parent her child.

At approximately midnight, and again at approximately 4:00 a.m. on April 17, 2012, R.S. awoke. On both occasions, Moore said, he changed her diaper and gave her a bottle. She seemed fine and went back to sleep after the bottles.

At approximately 7:30 a.m., appellant told Moore she was leaving the house and asked him to keep an eye on the children. When appellant returned, Moore went back to sleep, to be awakened a short time later to the sound of R.S. crying and appellant, sounding irritated, saying, this "is F—ing bullshit, I fed you , I changed you. . . why won't you stop crying."

Moore dozed off to be awakened again by "the sound of banging," as if on a desk, and R.S. "gasping a little bit" and crying loudly. A few minutes later, appellant told Moore that something was wrong with R.S.'s head, although, to Moore, she seemed more irritated than concerned. Appellant said she did not know what had happened to R.S. and did not understand how the injuries occurred. When Moore grazed his hand over the child's head,

she began to cry hysterically. He felt a soft, or "mushy," spot on her head and noticed swelling and bruising around her eyes.

Moore told appellant that if she thought something was wrong, she should take the baby to the hospital, but appellant demurred, afraid that Child Protective Services would get involved because of the nature of the injuries. Instead, she went to Walmart and obtained children's strength–not infants'–Tylenol and ibuprofen.[3] When she returned home, she administered the medicine to R.S. and waited approximately two hours to see if she improved; appellant did not call a doctor. R.S. remained fussy, so appellant finally took the child to the hospital, approximately five hours after the injuries appeared.

R.S. was examined by Dr. Kimmie Cass, Director of Pediatric Emergency Medicine, in the emergency department of the Upper Chesapeake Medical Center. Dr. Cass observed "multiple bruises and swelling throughout her head and face." Appellant told Dr. Cass that she was unsure of what had happened to R.S., that she had awoken to find the child with the swelling and bruising on her face. She denied any type of fall or accident.

Based on the multiple bruises and "boggy hematoma" or "mushy area" on her skull, Dr. Cass's initial impression was that R.S. had suffered abuse. A head CT later revealed a "bilateral comminuted skull fracture [*i.e.*, the skull was broken into pieces] on the right and left parietal region as well as a linear occipital skull fracture." Such injuries, the doctor said,

[3]Moore and appellant testified that appellant purchased Tylenol and ibuprofen, but the photographs depicting the medicine boxes, which were admitted into evidence, indicated she had actually administered Triaminic and ibuprofen.

would have required a heavy or high impact with multiple blows to the head. The bruising associated with that type of injury would have appeared on the child within 30 minutes to an hour after the blows.

After her examination, Dr. Cass retained her initial opinion that abuse was the cause of R.S.'s injuries and that the injuries, coupled with an approximate five hour wait in seeking medical attention, created a substantial risk of brain swelling and death. She also found it very unusual that an eight-month-old baby was "fussy and cranky" with her mother, but was willing to be consoled by hospital staff.

R.S. was transferred to Johns Hopkins Hospital for a pediatric neurosurgical evaluation and monitoring in the intensive care unit. R.S. remained at Hopkins for three days, during which time appellant did not visit her once because she did not want to get involved with the police and Child Protective Services.

Harford County Sheriff's Office Detective Carey Gerres, assigned to the Child Advocacy Center, responded to the Upper Chesapeake Medical Center for a possible child abuse case; she recorded appellant's statement about R.S.'s injuries.[4] Gerres noted that when

[4]During the April 17, 2012 recorded statement, appellant told Gerres that she called the pediatrician's office when she knew something was wrong with R.S. but was told she was unable to be seen. She also said she did not know what happened to injure the child but opined that she may have hit her head against the crib while rocking on all fours. She denied any concerns over Moore's care of the children, stating that "he's fantastic with them" and that she would "trust him with their lives."

During a second recorded statement on April 24, 2012, she told Gerres that she had spent at least five hours a day with R.S. while she was at Hopkins, which she later admitted

(continued...)

the child began to shriek during the preparations for transfer, appellant displayed no emotion, instead becoming defensive.

Gerres interviewed Moore at his and appellant's home. Initially concerned more for appellant than R.S., and in fear of himself being charged, Moore told Gerres he did not know what happened to R.S, but he later related the sequence of events to which he testified at trial. Gerres executed a search warrant at the home, which yielded appellant's cell phone, torn up children's medicine boxes, and other evidence. Gerres also confirmed with Dr. Neelkantan, R.S.'s pediatrician, that appellant had not called the doctor on April 17, 2012 in concern of R.S.'s condition, as she told Gerres she had. Based on Gerres's interviews with appellant and Moore, appellant was arrested on May 9, 2012.[5]

At trial, the State introduced text messages sent from appellant's cell phone to Moore's cell phone while appellant was at the hospital with R.S. One read, "I've been questioned about the bruises and everything. I don't think this is going to end well. Her head

[4](...continued)
was a lie. She also admitted to lying about calling the pediatrician on April 17, 2012. She initially denied that Moore had injured R.S., but when the detective repeatedly told her "It's either you or Ed," she said, "I don't wanna believe that he is capable of that" and, "He's probably gonna try to put it on me to keep himself from going to jail."

[5]Appellant contacted Gerres from the Harford County Detention Center on May 10, 2012, and in her final recorded statement, she said she had not been "completely truthful" about Moore, afraid that if she said something about him, he would cause harm to her, her family, or her children. She said that on the night R.S. sustained her injuries, she saw Moore at the crib with his left arm swinging down into the crib. At trial, she admitted that, too, was a lie.

is swollen." A second text related, "CPS is going to want to talk to you. . . They said there is no way she could have done this. It had to be by force. That pretty much it was you or me. I'm on the verge of a total breakdown. I don't know if you're gonna want to be with me after all this." The State also introduced a private Facebook message sent from appellant's phone to Moore, stating, in part, "I wasn't made to be a mother. I definitely wasn't made for multiple kids. No one knows what kind of fucked up ideas run through my head when I'm on the edge. How many times I've thought about dropping them off and disappearing and never coming back. I try but I'll never be good enough. I'm a piece of shit mother."

At the close of the State's case-in-chief, appellant moved for judgment of acquittal, arguing that the State had failed to prove neglect, as it was undisputed that appellant took R.S. to the hospital, even if the visit was somewhat delayed. Given Dr. Cass's testimony, which established that the delay did not actually result in worse circumstances than would have occurred with prompt presentment to the hospital, the State had not met its burden of proving neglect. As to the charges of child abuse, appellant averred that the State had not proved it was appellant who caused R.S.'s injuries, as there were two adults in the house with the child at the time she was injured.

The State countered that Dr. Cass had testified that the delay in getting medical treatment for R.S. resulted in substantial risk of harm to R.S.'s health, which met the definition of neglect under the applicable statute. The State submitted on the abuse charges.

The court ruled as follows:

> We'll deal with the two easier ones, obviously counts one and two. That really hinges on the credibility of the State witness and that is up to the trier of fact. If they believe that witness, then it is there. If they don't, then it is not. So, I'll respectfully deny as to counts one and two.
>
> Count three is a little bit closer. However, as Ms. [PROSECUTOR] just pointed out, the issue is the failure to provide assistance, and the whole issue here is the timeliness in getting this baby to the hospital. Like I say, I was going to go back and check my notes, but my recollection was that at least several hours and Ms. [PROSECUTOR] is submitting five, but even when you are talking about several hours that certainly generates an issue of fact for the jury. Once again, it goes to the question of a substantial risk of harm and the doctor certainly testified to that. It doesn't have had to happen, it is a question of whether it creates a substantial risk. I think that was clearly brought out [b]y the medical expert in this case. As to the intentional failure, you can infer intent from the way that somebody acts. That is once again up to the trier of fact. The Court will respectfully deny the motion in its entirety.

In appellant's defense, R.S.'s great-grandmother, Carolyn S., testified that between December 2011 and April 2012, she had visited with appellant with R.S. twice weekly, noting that appellant was a "loving mother" who took care of the baby. When R.S, was fussy, appellant "did the necessary things to take care of a baby." Carolyn S. never saw appellant upset with the children and had no concerns about her ability to mother the children.

Appellant's friend, Phallen Price, similarly testified that appellant was "loving, motherly, very attentive" to R.S. When R.S. was fussy, Price observed appellant change, feed, and rock her. In contrast, she said that Moore was "very rough, very frustrated, very aggressive" with R.S., yelling and cursing when the child was fussy. She conceded, however, that she had never seen him hit the child, nor had she relayed those impressions to Detective Gerres when asked about Moore's interaction with R.S. Price further conceded that she was

aware that appellant had not wanted to have a second child and that appellant had been depressed since R.S.'s birth.

Appellant testified that on the night in question, she put R.S. to bed after a bath at approximately 8:00 or 9:00 p.m. She was awakened at approximately 1:30 a.m. by R.S.'s cries, but Moore attended to her. Shortly after 8:30 a.m., R.S. woke screaming "like something was wrong." When appellant checked on the child, she noticed a slight lump on R.S.'s head and swelling around her eye. She touched the child's head, and R.S. screamed.

Appellant said she did not immediately call 911 or take R.S. to the hospital because she did not know what to do. It was Moore who advised her to give R.S. medicine, and after receiving it, the baby calmed and fell asleep for a few hours. When she awoke around noon, the swelling around her eye had turned purple, and appellant told Moore she could not wait any longer before taking the baby to the hospital.

She denied inflicting any injuries upon her daughter, instead attempting to cast suspicion upon Moore, "the only other person at the house that could have." She stated that she had not taken R.S. to the emergency room sooner because she did not know what to do after Moore told her the child must have bumped her head and would be fine. It was Moore, she said, who told her to medicate the child first to see if she improved.

Appellant attempted to explain her Facebook message to Moore as the result of extreme stress. She further admitted to lying to Detective Gerres about seeing Moore raise a hand to R.S. and about being afraid of him. In fact, she admitted that virtually everything

she had said in her three statements to Gerres was a lie. Instead, she insisted that her trial testimony was the truth, as her memory was then better than it had been in 2012.

At the close of the entire case, appellant renewed her motion for judgment of acquittal, "incorporating the arguments earlier made at the end of the State's case." The court again denied the motion.

Additional relevant facts will be set forth as necessary.

## DISCUSSION

### I. Other Crimes Evidence

Appellant first assigns error to the trial court's admission of evidence of prior bad acts, including grabbing, pulling, and pinching R.S. and putting adult strength Benadryl in the baby's bottle so that she would sleep. That evidence, she continues, served only to show that she was a bad mother, and admission of the evidence suggested that she had likely inflicted the head injuries upon R.S. because she had "done other bad things" to the child in the past.

When the prosecutor questioned Moore as to whether he had ever seen appellant discipline R.S., defense counsel objected, stating, "I don't think this testimony is necessary or relevant to the charges here. We could be getting into a prior bad act perhaps." The prosecutor relying upon *State v. Taylor*, 347 Md. 363 (1997), argued that testimony regarding prior acts of discipline to show intent and pattern of discipline was permissible. After

reviewing *Taylor*, the court, for the reasons stated therein, overruled appellant's objection and permitted the following testimony:

BY MS. [PROSECUTOR]:

Q. Did you ever have occasion to see the Defendant discipline R[.]?

A. I mean, you could use the term discipline loosely, but there was times when R[.] would be crying on the bed and Kayla wouldn't want to deal with her crying so she would just pretty much grab her by her arm and pull her over and go and put her in the crib and then come back and shut the door. But then on another account she was changing R[.] one time and R[.] was squirming and just being a baby and it was making it difficult for Kayla to put the diaper on so she ended up pushing her legs down and pinching her inner thigh. At that time R[.] went pretty much hysterical and she winded up just pushing the flap down, getting the diaper on really quick and pretty much putting her in the crib and leaving her there.

Q. Did you ever see injuries on R[.]?

A. Yeah. There were bruises all the time, bruises on her legs and arms. Even the day before all of this, the date in question, she had bruises on her forehead that were going away and she had a little bit of a bruise underneath one of her eyes.

* * *

Q. Did you ever talk to the Defendant about her discipline of R[.]? I'm going to use the word discipline.

A. I mean, vaguely. But it is kind of one of them things. I mean, I now that it was wrong [sic], but it was like you don't tell people how to parent their children. You know, me being in a relationship with her was kind of just like bad grounds to walk on.

* * *

Q. What medicine did she give R[. on the morning of April 17, 2012]?

A. She ended up giving her, not infant strength, but children's strength ibuprofen and Tylenol.

Q. Was that what she purchased that morning at Walmart?

A. Yes.

Q. Did she say to you why she got the children's versus the infant?

A. No, not off the top of my head. I don't recall her saying anything.

Q. Is that something that she was ordinarily giving her?

A. She had given letter [sic] children's medicine a couple of times and there was also a couple of occasions that she would give her Benadryl.

MR. [DEFENSE COUNSEL]: Objection, Your Honor.

THE COURT: No, overruled.

Q. Go ahead.

A. There was times that she would give her Benadryl and then when she ran out of the children's or infant Benadryl she actually went as far as to crush up adult strength Benadryl and put it in her bottle. She told me this after the fact of doing it. You know, just trying to get R[.] to go to sleep.

A trial court's evidentiary rulings on the admissibility of other crimes or bad acts evidence, other than for impeachment purposes, implicate Md. Rule 5-404(b), which provides:

(b) **Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

A bad act is "an activity or conduct, not necessarily criminal, that tends to impugn or reflect adversely upon one's character, taking into consideration the facts of the underlying lawsuit." *Klauenberg v. State*, 355 Md. 528, 549 (1999).

In general, evidence offered for the purpose of proving a defendant's criminal propensity is inadmissible. *Snyder v. State*, 361 Md. 580, 602 (2000). To be admissible, otherwise excludable other crimes, wrongs, or acts evidence "must be substantially relevant to some contested issue in the case and offered for a purpose other than to prove the criminal character of the defendant." *Id.* at 603. Relevant evidence "is not made inadmissible by reason of the fact that it tends to prove the defendant guilty of a crime other than the one for which he is indicted. Such evidence is not admitted because it is proof of another crime, but because of its relevancy of the charge upon trial." *Jones v. State*, 182 Md. 653, 656 (1944). And, courts have "approved bad acts evidence to show the context of the crime in many circumstances, often simply to complete the story of the offense." *U.S. v. Powers*, 59 F.3d 1460, 1466 (4th Cir.1995). If relevant, such evidence is admitted unless its probative value is substantially outweighed by its prejudice to the defendant. *State v. Faulkner*, 314 Md. 630, 641 (1989).

Assuming without deciding that the acts described by Moore comprised "bad acts" under Rule 5-404, we are required to undertake a three-step analysis in determining the admissibility of the prior bad acts. *Wagner v. State*, 213 Md. App. 419, 458 (2013). The trial

court was first required to determine if the evidence fell within one of the exceptions listed in Rule 5–404(b), or otherwise had special relevance to some contested issue in the case. *Id.* Indeed, appellant's prior treatment of R.S., in an apparent attempt to keep the undisputedly fussy baby quiet and docile, arguably tended to prove motive, intent, and/or absence of mistake or accident in inflicting blows upon the head of the crying child on April 17, 2012.

Second, after determining that the evidence fell within an exception to the ban on the use of other crimes evidence, the trial court was required to find that appellant's involvement in the prior bad acts was established by clear and convincing evidence. *Id.* at 459. In conducting a review of the trial court's decision, this Court looks """only at the legal question of whether there was some competent evidence which, if believed, could persuade the fact finder as to the existence of the fact in issue."""" *Id.* (quoting *Henry v. State,* 184 Md. App. 146, 168–69 (2009), in turn quoting *Emory v. State,* 101 Md. App. 585, 622 (1994)). Moore's testimony that he personally observed appellant grab, pull, and pinch R.S. and administer adult-strength Benadryl to the child to make her sleep, along with appellant's failure to dispute his statement during her own testimony, provided competent evidence of the fact sufficient to persuade the jurors, if they believed Moore's testimony.

Finally, the trial court was required to weigh the necessity for and probative value of the other crimes evidence against any undue prejudice likely to result from its admission. *Id.* In light of the charges of child abuse and neglect, the trial court properly determined that the limited evidence of appellant's prior "discipline" of her eight-month-old daughter was not

unfairly prejudicial in light of its probative value in connecting appellant to R.S.'s injuries on April 17, 2012. The trial court did not abuse its discretion in admitting this evidence.

**II. Sufficiency of the Evidence**

Appellant also contends that the evidence adduced by the State was insufficient to support the convictions for the crimes of first-degree child abuse and neglect of a minor. This Court recently set forth the applicable standard of review in determining the sufficiency of the evidence on appeal:

> 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. The Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence-that is, 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 offense charged beyond a reasonable doubt. We must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference. Further, we do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.

*Donati v. State,* 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014) (Internal quotation marks and citations omitted).

Maryland Code (2002 Repl. Vol., 2011 Supp.), §3-601 of the Criminal Law Article ("CL"), prohibits a parent or household or family member from causing abuse to a minor. "Abuse" is defined by CL §3-601(a)(2) 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." And, pursuant to CL §3-601(b), "first-degree child abuse" occurs when a parent or other person who has care, custody, or responsibility for the supervision of a minor causes abuse that results in the death of the minor or causes severe physical injury to the minor.

Appellant does not dispute that the State proved each element of first-degree child abuse. Instead, she avers that the State failed to prove sufficiently that it was she who inflicted the abuse upon R.S., as it was equally likely that Moore, the only other adult in the house at the time R.S. was injured, abused the child.

Although Moore testified that appellant was the person who inflicted the injuries upon R.S., appellant attempts to assail his credibility by pointing out the impeachment value of prior crimes of which Moore had been convicted and his motive to lie, aware that if he were convicted of the abuse while on probation, he would likely return to prison and fail to gain visitation with his son. What she fails to acknowledge, however, is that it is "axiomatic that weighing the credibility of witnesses and resolving any conflicts in the evidence are tasks properly assigned to the factfinder,*"* not to be undertaken by an appellate court on review. *Marlin v. State*, 192 Md. App. 134, 153, *cert. denied*, 415 Md. 339 (2010). The jury was entitled to credit Moore's testimony, even in light of any impeachment of him as a witness, and reject appellant's assertions of innocence, especially in light of the numerous lies appellant admitted she told, her arguably incriminating text messages and Facebook

messages to Moore, and her refusal to visit R.S. at Hopkins because she feared questions by Child Protective Services and police.

She fares no better with her insufficiency argument as it relates to the charge of neglect. CL §3-602.1 prohibits neglect of a minor, which is defined 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."

The State's theory of neglect was based on appellant's decision to wait several hours after noticing R.S.'s severe head injuries before presenting the child to a doctor, instead attempting to sedate her with children's strength medications. Appellant claims she did not intentionally wait to seek medical treatment; she simply had not been faced with that type of injury to her child before and did not know what to do.

The State, however, adduced sufficient evidence, if the jury believed it, to prove that appellant intentionally failed to provide necessary assistance such that she created a substantial risk of harm to R.S.'s physical health. Although appellant related her uncertainty about how to treat R.S.'s injuries, the jury was presented with Moore's testimony that he had urged her to take the baby to the hospital much earlier in the day on which she was injured, as well as competent testimony by R.S.'s treating physician, Dr. Cass, who clearly stated that R.S.'s injuries, coupled with an approximate five hour wait in seeking medical attention, created a substantial risk of brain swelling and death. Again, it was up to the jury to

determine which witness(es)' testimony to credit and reject, and we cannot say that it was unreasonable in finding appellant guilty of neglect of a minor beyond a reasonable doubt.

**THE JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY ARE AFFIRMED. APPELLANT TO PAY COSTS.**