Circuit Court for Baltimore City
Case No. 115327046

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 152

September Term, 2018

ANNE KIRSCH

v.

STATE OF MARYLAND

Meredith,
Berger,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: July 9, 2019

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

After a bench trial, the Circuit Court for Baltimore County found Anne Kirsch guilty of involuntary manslaughter, first-degree child abuse resulting in death, first-degree child abuse resulting in serious bodily injury, second-degree child abuse, child neglect, first- and second-degree assault, and reckless endangerment. For sentencing purposes, the court merged the convictions for child neglect and second-degree child abuse into the conviction for first-degree child abuse resulting in severe physical injury. The court then ordered her to serve ten years for involuntary manslaughter, forty years for first-degree child abuse resulting in death, and twenty-five years for first-degree child abuse resulting in severe physical injury, all to be served consecutively. The court also merged the first-degree assault and second-degree assault and reckless endangerment convictions and imposed a concurrent twenty-five-year sentence. The court then suspended all but ten years of the concurrent twenty-five-year sentence and all but thirty years of the seventy-five-year sentence.

On appeal, Ms. Kirsch argues that the evidence was insufficient to support all of the convictions except child neglect. We disagree and affirm the convictions. We agree with Ms. Kirsch, however, that the court should have merged her conviction for first-degree child abuse resulting in death and first-degree child abuse resulting in severe physical injury, so we vacate her sentences and remand for resentencing.

I. BACKGROUND

Ms. Kirsch and her husband, Matthew, worked as mechanics for Reliable Trucking and Contracting and Brooks Construction Company in West Baltimore. On or about

October 11, 2015, Ms. Kirsch gave birth to a baby boy in one of the auto repair bays. The baby, Matthew, Jr., was born substance-exposed as a result of Ms. Kirsch's daily heroin use during her pregnancy. He died nine days after he was born, and at no time during his short life did he receive any medical attention or treatment.

Before Matthew, Jr. was born, the Kirsches lived in a vehicle on the Reliable Trucking repair lot. Warren Fischer, an employee of Reliable Trucking, testified that he would let them into the building at night so they could take showers and stay in the air conditioning. After Matthew, Jr. was born, the Kirsches moved into the third-floor apartment of a vacant home nearby. The area where the Kirsches lived had a hard laminate wood-like floor, a mattress, a Pack 'n Play bouncy chair, hot plate, space heater, and refrigerator, but no central heating, no hot water, and no working stove or oven. The house itself had a leaking roof, mold, mildew and rotting floors throughout.

Ms. Kirsch spoke to Detectives Jill Beauregard and Gordon Carew twice regarding the death of her son—first on October 20, 2015, the day that Matthew, Jr. died, then a second time on October 29, 2015, when she was arrested. She was charged in accordance with the Office of the Chief Medical Examiner's post-mortem examination report findings revealing that Matthew, Jr. had signs of fatal injury described as "fresh" hemorrhages in his brain and back. The medical examiner also noted evidence of neglect from his "sunken" anterior fontanel, his thin 1/16-inch layer of abdominal fat, and the lack of fluid in his stomach and intestines.

In Ms. Kirsch's first statement, she told the detectives that she had been up

throughout the night of October 19 with Matthew, Jr. because "he was a little gassy." She said she woke up that morning at approximately 7 a.m., treated his diaper rash with zinc oxide, and "fed him a little bit" before putting him back down. She mentioned starting a movie on her laptop and when she checked on him about thirty minutes later she noticed "his color was way off" and that he was "blue" so she told Mr. Kirsch to call 911.

Seconds later, the detective asked Ms. Kirsch to go back and explain, step by step, what happened after 7 a.m. that day:[1]

> DET. BEAUREGARD: So you said woke up at seven o'clock this morning?
>
> [MS. KIRSCH]: Right
>
> DET. BEAUREGARD: So take me, walk me through the, the steps so 7 am.
>
> [MS. KIRSCH]: 7 am it every (inaudible).
>
> DET. BEAUREGARD: After your awake at 7 am?
>
> [MS. KIRSCH]: Yeah, he . . .. he was. I rolled over he you know I uncovered him he looked fine. He looked normal.
>
> DET. BEAUREGARD: And where was Matthew sleeping?
>
> [MS. KIRSCH]: Right next to the bed in his, he's got a little rocking chair thing that um a friend of mine gave us ah so I put some blankets in it to kind a like boost it up a little bit.
>
> DET. BEAUREGARD: Uh huh.
>
> [MS. KIRSCH]: Cause he likes the fluffy blankets and lay him in that cause I was afraid to lay him in the bed with us that we might roll over on him you know. They say don't put him in the bed with you but I didn't want a put in all the way across the room either. So he was always right, right here. So I heard him and so I, I uncovered him and I held his hand and he went right back to sleep cause he had been up like I said through the

[1] The transcription of Ms. Kirsch's statement to police contains grammatical, spelling, and punctuation errors that we have not revised or corrected.

night you know. He'd been up really late. And then I rocked him for a while this is probably I don't know what time everything happened. I did not look at the clock to see what time everything happened. If I had to guess it say it's probably about 9..…9:30 that you know, that I noticed he'd been quiet but after I rocked him back he seem calmer, I mean he seemed better then he was the night before. Just like I said he was really like gassy the night before and kind a fussy so he seemed better but then when I went back to check him again after you know it had to have been, it had to have been within a half an hour from when I first, cause I time my cell phone what I'm doing you know. So if I'm watching a movie if I get like the quarter of the way through it I check on him.

* * *

DET. BEAUREGARD: So he woke up and then you were rocking him . . . . . .

[MS. KIRSCH]: Right

DET. BEAUREGARD: . . . .. back to sleep.

[MS. KIRSCH]: Back to sleep.

DET. BEAUREGARD: And he what fell asleep?

[MS. KIRSCH]: And he fell asleep.

DET. BEAUREGARD: Okay. And then what, what were you doing?

[MS. KIRSCH]: And I stayed well I got up and I went to the bathroom. And I came back to bed and I went on my computer for a minute. And I played a game for little while, listen to him he was making noise uncovered his face he looked okay so I you know put him back in his little snuggly and switched over to watching a ah watching a movie and then when I got you know probably about a quarter of the way through that you know I thought he's been really quiet which he does sometimes when he's asleep but I always check on him when he's quiet like that. So I checked on him and cause I was just afraid everyday of something happening. And I don't know. And I, but I just thought he was gonna be okay. He was still warm.

DET. BEAUREGARD: And when you went back what did you see?

> [MS. KIRSCH]: I, I stuck my hand and he was warm and it felt like he gripped it. I said then I you know pulled back his little, his little ah snuggly like actually a blanket that he loves a green blanket. And he ah I saw that his skin was not right. And I know blue, blue means not enough oxygen. I mean I was pre-med student before I had you know, I so I pulled him out, laid him down flat checked his nose, mouth, called my husband you know.
>
> DET. BEAUREGARD: And your husband Matthew . . . .
>
> [MS. KIRSCH]: Right
>
> DET. BEAUREGARD: . . . . was home?
>
> [MS. KIRSCH]: Was home yeah.

She went on to say that her husband was in the room with her, asleep, and when she noticed Matthew, Jr. was blue, she instructed him to call 911 while she performed CPR.

Paramedics arrived at 10:02 a.m. Ms. Kirsch told them that when she woke around 7 a.m., Matthew, Jr. fed "as normal." They noticed Matthew, Jr. was blue and looked "completely lifeless." He was not breathing and did not have a heartbeat. They tried, but were unable resuscitate him at the scene. He was taken to the hospital, and after further failed attempts to resuscitate him, he was pronounced dead at 10:22 a.m.

When prompted later by police to talk more about the events leading up to Matthew, Jr.'s death, Ms. Kirsch contradicted her earlier statement that he was "fed a little bit" that morning—she told police in her second statement that she woke up at 7 a.m. and prepared Matthew Jr.'s bottle, but he fell back to sleep before she fed him. Also, in her first statement, she said that Matthew, Jr. went to sleep around 2 a.m. after a long night of whining. But in her second statement, she told the detectives that the night before Matthew, Jr. died, she had left him alone with Mr. Kirsch while she walked to the local 7-Eleven for

a late-night food run. She said that before she left, Matthew, Jr. had been crying inconsolably, but when she returned he was "finally relaxed" and didn't wake up at all during the night, which she thought was "odd."

Notwithstanding the other inconsistencies between her statements, Ms. Kirsch admitted that she had used heroin before, during, and after Matthew, Jr. was born, including the night before and the morning of Matthew, Jr.'s death. Ms. Kirsch also stated consistently that she never sought prenatal or post-natal care for Matthew, Jr., and that she had planned a home birth.

Between the absence of medical records and Ms. Kirsch's evolving statements, a great deal of uncertainty remained about what happened during Matthew, Jr.'s nine days of life. A large portion of the trial evidence took the form of testimony from the few people who saw Matthew, Jr. while he was alive and from the medical professionals who evaluated him after he died. For example, Mr. Fischer, Ms. Kirsch's colleague at Reliable Trucking, testified at trial that he and others at work told her to take Matthew, Jr. to see a doctor. Mr. Fischer also said that he knew Ms. Kirsch was using drugs and that when he found out she was pregnant he had suggested that she "cut back" and try using the Center for Addicted Pregnancies.

The court also heard testimony from a neighbor, Cecilia Wright Brown, who lived next door to the home where the Kirsches were living. Ms. Brown testified that on the evening of October 16, 2015, she saw a woman (who turned out to be Ms. Kirsch), on the porch of the house next door. She called police to investigate because she thought the

woman looked suspicious and she knew the house to be unoccupied. She bought Ms. Kirsch baby food and blankets when she saw that Matthew, Jr. was wrapped in a thin blanket with no clothes on.

Sergeant Jamal Johnson was one of the officers who responded to Ms. Brown's 911 call. He testified that the house was in a dilapidated state, with chipped paint, damaged floors, and building material "all over the place." He said that Mr. and Ms. Kirsch appeared to be inhabiting the third floor; he saw a crib, a few cans of baby formula, and a few items of clothing. Matthew, Jr. was wrapped in a sheet and wore only a diaper. Sgt. Johnson told the court that he advised Ms. Kirsch of the child protective services available, but that she showed no interest and "kind of just walked away." Sgt. Johnson instructed another officer at the scene to call child protective services. They reportedly called an after-hours line—twice—with no response.

Two days later, on October 18, 2015, Ms. Kirsch was taking care of Matthew, Jr. at their apartment when Mr. Kirsch called her into work to help him with a repair. Up until that point, Ms. Kirsch had not gone to work since giving birth. Ms. Kirsch arrived at the shop and brought Matthew, Jr. with her. When he saw them, Mr. Fischer offered to take Matthew, Jr. to his fiancée, Annette Ross, at their home nearby. Ms. Kirsch accepted, but insisted on bringing the baby to Ms. Ross herself. Ms. Kirsch had gotten to know Ms. Ross over the past few months because Ms. Ross gave her clothes to wear and cooked for her on an almost daily basis.

Ms. Ross agreed to take care of Matthew, Jr. for two or three hours while the

Kirsches were at work. She bathed him, cleaned his blanket, and bought him new clothes, bottles, diapers, and blankets. She said she noticed that Matthew, Jr. shook and refused to eat. She was only able to feed him about one to two ounces of formula. When Ms. Kirsch picked up Matthew, Jr. later that day, Ms. Ross asked three times if she could keep him overnight, and she invited Ms. Kirsch to stay as well. Ms. Kirsch declined. Matthew, Jr. died less than two days later.

At trial, Dr. Patricia Aronica, from the Office of the Medical Examiner, testified that Matthew, Jr.'s death was caused by blunt force trauma with malnourishment as a contributing factor. When asked about the timing of Matthew, Jr.'s injury and death, she said that the injuries likely caused him to die quickly, and based on his warm body temperature at the hospital and the lack of swelling in his brain, it was unlikely that he had been injured more than a few hours before the paramedics arrived.

Ms. Kirsch was convicted of involuntary manslaughter, first-degree child abuse resulting in death, first-degree child abuse resulting in serious bodily injury, second-degree child abuse, child neglect, first- and second-degree assault, and reckless endangerment. We address both issues on appeal below and provide additional facts as appropriate.

II. DISCUSSION

On appeal, Ms. Kirsch challenges (1) the sufficiency of the evidence to support all but one of her convictions and (2) the trial court's decision not to merge her sentences for first-degree child abuse resulting in death and first-degree child abuse resulting in severe

physical injury.[2] We find the evidence sufficient to sustain the convictions, but agree with her that the two first-degree assault counts should merge for sentencing.

A. The Evidence Was Sufficient To Support Ms. Kirsch's Convictions Arising From The Death of Her Son.

When reviewing the sufficiency of the evidence to sustain a conviction, we view the evidence "in the light most favorable to the prosecution and determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Perry v. State*, 229 Md. App. 687, 696 (2016) (*quoting State v. Smith*, 374 Md. 527, 533 (2003)). We will affirm the conviction if any rational fact-finder could have been persuaded by the evidence. *Fraidin v. State*, 85 Md. App. 231, 241–42 (1991). Put another way, we consider "whether the evidence shows directly or supports a rational inference of the facts to be proved, from which the trier of fact could fairly be convinced beyond a reasonable doubt of the defendant's guilt of the offense charged." *Espinosa v. State*, 198 Md. App. 354, 399 (2011) (*quoting Wilson v. State*, 319 Md. 530, 535–36 (1990)).

Involuntary manslaughter is the unintentional killing of a human being, irrespective

[2] Ms. Kirsch offered the following Questions Presented in her brief:

> 1. Whether Ms. Kirsch's convictions for first and second degree child abuse, first and second degree assault, involuntary manslaughter, and reckless endangerment were supported by constitutionally sufficient evidence?
>
> 2. Whether the lower court erred when it failed to merge Ms. Kirsch's convictions for first degree child abuse resulting in death and first degree child abuse resulting in serious injury?

of malice codified in Maryland Code (2002, 2012 Repl. Vol.), § 2-207(a) of the Criminal Law Article ("CR"). *See State v. Albrecht*, 336 Md. 475, 499 (1994). Our courts have acknowledged "three varieties" of involuntary manslaughter: (1) an unlawful act that doesn't amount to a felony; (2) negligently committing a lawful act; or (3) negligently failing to perform a legal duty. *State v. Thomas*, No. 33, Sept. Term, 2018, 2019 WL 2574642, at *8 (Md. June 24, 2019); *see also Johnson v. State*, 223 Md. App. 128, 138–39 (2015). "For the latter two categories of involuntary manslaughter, the negligence must be criminally culpable—i.e., grossly negligent." *Id.* (cleaned up). The case before us deals solely with the gross negligence standard and Matthew, Jr.'s two proximate causes of death: trauma and malnourishment.

Ms. Kirsch argues that the State was required to "prove who took what actions, with what intent, and with what impact" in the death of her son. She characterizes the trial court's inferences of causation as irrational, and argues that because she was not the only one with Matthew, Jr. in the hours leading up to his death, she cannot be held accountable for actions that could have been taken by another person in the room, specifically her husband. She also asserts that the State failed to prove she acted negligently and caused Matthew, Jr.'s death because, she says, it did not prove how Matthew, Jr.'s trauma was actually inflicted. The State argues that there was evidence to support Ms. Kirsch's guilt for both Matthew, Jr.'s trauma and his malnourishment and that her failure to care for Matthew, Jr.—standing alone—caused Matthew, Jr.'s death. We agree.

Through medical expert testimony, the State proved that Matthew, Jr.'s trauma-

based injuries were inflicted by collision with a hard surface. At a minimum, his injuries indicate that he was dropped or hit while in Ms. Kirsch's care. Ms. Kirsch never admitted to mishandling Matthew, Jr. and she said she "kn[e]w better [than] to shake him." And she claimed that Mr. Kirsch treated Matthew, Jr. gently, "like glass." During the window of time when Matthew, Jr.'s trauma was inflicted, Ms. Kirsch said that she was awake, under the influence of heroin, and regularly checking on him, while her husband was asleep in the bed next to her. A reasonable fact-finder could infer from the testimony that Ms. Kirsch was responsible for the fatal blow to Matthew, Jr., and what would have been—at the very least—negligent conduct beyond that of an ordinarily careful and prudent person.

There is equally sufficient evidence to support a finding of gross negligence arising from Matthew, Jr.'s malnourishment. Under Maryland Code, § 5-203(b) of the Family Law Article, Ms. Kirsch had a legal duty to obtain necessary medical treatment for her son.[3] *See Pepper v. Johns Hopkins Hosp.*, 111 Md. App. 49, 62 (1996) ("Medical care is embraced within the scope of [the] statutory duty of parents to support their minor children."). But Matthew, Jr. entered the hospital for the first time ever on the day of his death, with only 1/16th inch of fat on his body, no nourishment in his stomach, less than a tablespoon of mucous in his intestines, and a vacuolized liver. He weighed 4.5 pounds, and compared to

[3] "The parents of a minor child . . . (1) are jointly and severally responsible for the child's support, care, nurture, welfare, and education; and (2) have the same powers and duties in relation to the child." Md. Code (1984, 2012 Repl. Vol., 2018 Cum. Supp.), § 5-203(b) of the Family Law Article. This opinion focuses on Ms. Kirsch's responsibilities to Matthew, Jr. because her convictions are the only ones before us; we should not be read to imply that Mr. Kirsch was not also responsible for his son's health care.

children born at term, he was below the second percentile for height and weight. He was described by Ms. Ross to have tremors and trouble feeding, and even Ms. Kirsch described him as "gassy" and "fussy."

At trial, the State presented evidence that Matthew, Jr.'s behaviors were consistent with infants who suffer from neonatal abstinence syndrome ("NAS"), a group of conditions afflicting infants born to substance-addicted mothers. The State's expert on NAS, Dr. Lauren Janssom, testified that she would expect a baby with Matthew, Jr.'s symptoms to have NAS and to require hospitalization, and that the signs of NAS typically are evident to mothers:

> [A] woman with an opioid use disorder should reasonably expect that an infant would withdraw in the same fashion that she might withdraw. Meaning that if you have a very irritable infant who's exhibiting a lot of symptoms of neonatal abstinence syndrome[,] the reasonable conclusion would be that this would be a withdrawal phenomenon because that mother understands withdrawal phenomenon."

Dr. Jannsom said that on average, signs of NAS appear within two to three days.

Matthew, Jr. was alive for nine days, during which Ms. Kirsch never sought medical care or treatment for him. The evidence at trial allowed a reasonable fact-finder to conclude that Ms. Kirsch had failed negligently to perform her legal duty as a parent to provide medical care for Matthew, Jr., and that this failure led to his death. We affirm the conviction for involuntary manslaughter.

We reach the same conclusion with regard to the three child abuse convictions: first-degree child abuse resulting in death, first-degree child abuse resulting in severe bodily

injury, and second-degree child abuse.[4] Child abuse in the first degree is abuse that results in death or severe bodily injury:

> 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 cause abuse to the minor that: (i) results in the death of the minor; or (ii) causes severe physical injury to the minor.

Md. Code (2002, 2012 Repl. Vol., 2018 Cum. Supp.), § 3-601(b)(1) of the Criminal Law Article ("CL"). "Abuse" is a "physical injury sustained by a minor as a result of cruel and 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." CL § 3-61(a)(1)(2).

Ms. Kirsch argues that the State failed to prove that she abused Matthew, Jr. because it couldn't prove that she was in "exclusive control" of him when his injuries were inflicted. She contrasts this case to *Deese v. State*, 367 Md. 293, 308 (2001), in which the State proved through circumstantial evidence that the defendant had inflicted fatal blunt force injuries to a three-year-old boy. The evidence "most favorable to the State" in that case allowed the jury to conclude that the defendant was the only person who had contact with the boy during the relevant period:

> (1) Kyle was alive on the morning of February 8, (2) Kyle was under Deese's exclusive supervision for a period of time that

[4] By its statutory definition, both first-degree child abuse convictions encompass second-degree child abuse, so although Ms. Kirsch was convicted of all three, if the evidence is sufficient for first-degree child abuse resulting in death, it is sufficient for all three. CL § 3-601(d)(1)(i) (Second-degree child abuse prohibits a parent from "caus[ing] abuse to [a] minor.").

> day, (3) Kyle was found dead a few hours after that period, (4) death was due to blunt force injuries to the head and possibly due to shaking, and (5) no one had contact with Kyle after the period described in (2) and before the event described in (3). From these circumstances, a rational jury could have inferred, beyond a reasonable doubt, that Deese inflicted the fatal injuries.

Id. The court reasoned that the defendant's "exclusive custody" of the victim supported a rational inference that the defendant inflicted the victim's blunt force head injuries. *Id.* at 314.

This case differs slightly from *Deese*, but not in a way that helps Ms. Kirsch: the evidence before this trial court was not purely circumstantial.[5] Ms. Kirsch's own statements to police painted her as Matthew, Jr.'s primary caretaker. By her own account, her husband was at home on the morning of Matthew, Jr.'s death, but she had been the one up with him. At trial, the medical examiner testified that Matthew, Jr.'s fatal injuries could not have been inflicted more than a few hours before the paramedics arrived at 10:02 a.m. Ms. Kirsch's own statements, then, put her in exclusive control of Matthew, Jr. during the timeframe when the medical examiner testified that Matthew, Jr.'s traumatic injuries were inflicted.

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[5] The applicable standard of review for sufficiency of the evidence has evolved since *Deese*, where the Court of Appeals stated "a conviction upon circumstantial evidence *alone* is not to be sustained unless the circumstances, taken together, are inconsistent with any reasonable hypothesis of innocence." 367 Md. at 308 (*quoting Wilson v. State*, 319 Md. 530, 573 (1990) (emphasis in original). Now, "regardless of whether the conviction rests upon direct evidence, a mixture of direct and circumstantial, or circumstantial evidence alone," we look to "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." *Smith v. State*, 415 Md. 174, 184 (2010) (*quoting Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979).

Her testimony, combined with the circumstantial evidence of Matthew Jr.'s injuries and the causes of his death, was sufficient for a rational trier of fact to find Ms. Kirsch guilty of child abuse.

So too with regard to first-degree assault. Intent to cause (or attempt to cause) serious physical injury to another distinguishes first-degree assault from second-degree assault.[6] CL § 3-202(a)(1). "Serious physical injury" is physical injury that: "(1) creates a substantial risk of death; or (2) causes permanent or protracted serious: (i) disfigurement; (ii) loss of the function of any bodily member or organ; or (iii) impairment of the function of any bodily member or organ." CL § 3-201(d). And "[i]n determining a defendant's intent, the trier of fact can infer the requisite intent from surrounding circumstances such as the accused's acts, conduct and words." *Jones v. State*, 213 Md. App. 208, 218 (2013) (cleaned up).

At trial, Dr. Aronica, the medical examiner, testified that Matthew, Jr.'s injuries to his head and his back indicated he had been hit with a force powerful enough to cause death within minutes or hours. As discussed above, Ms. Kirsch told the detectives that she was the only one caring for Matthew, Jr. during that time. She said that he had been fussy and was up late the night before. She also said that she knew not to lie him in the bed with her

[6] Second-degree assault, by contrast, requires proof that "(1) the defendant caused offensive physical contact with, or harm to, the victim; (2) the contact was the result of an intentional or reckless act of the defendant and was not accidental; and (3) the contact was not consented to by the victim or was not legally justified." *U.S. v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013) (cleaned up). The trial court properly merged Ms. Kirsch's second-degree assault conviction with her first-degree assault conviction at sentencing.

and she knew not to shake him. The court could, from this evidence, rationally have drawn an inference that Ms. Kirsch inflicted Matthew, Jr.'s injuries intentionally, and thus that she committed first-degree assault.

And finally, the evidence was sufficient to support the conviction for reckless endangerment, which is "conduct that creates a substantial risk of death or serious physical injury to another." CL § 3-204(a)(1). In *Jones v. State*, the Court of Appeals defined the three elements of reckless endangerment:

> The elements of a prima facie case 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.

357 Md. 408, 427 (2000). As a general intent crime, the State was not required to prove that Ms. Kirsch intended to create the risk of death or serious physical injury, only that her "conscious disregard of the risks and indifference to the consequences" was objectively reckless. *Holbrook v. State*, 364 Md. 354, 371 (2001).

This standard was met easily. The autopsy report revealed Matthew, Jr. died of traumatic injuries and malnourishment, and there was ample evidence of Ms. Kirsch's decisions not to seek medical care for her son and that she inflicted the blunt force injuries he suffered. The trial court found Ms. Kirsch used drugs throughout her pregnancy and that Matthew, Jr. was born with signs of addiction. Ms. Kirsch's friends and co-workers recommended she take him to the hospital, but Ms. Kirsch never took him. Of the few individuals who saw her with Matthew, Jr., many offered to help by giving her food,

supplies, and even child care because it was obvious that she needed it. But Ms. Kirsch and her husband were addicted to heroin. Her own statements put her in exclusive control of Matthew, Jr. during the time the medical examiner testified that his traumatic injuries were inflicted. And in her statements to police, she admitted that she had used heroin on the morning of Matthew, Jr.'s death and was unable to articulate accurately how much she had been able to feed him. Viewed in a light most favorable to the State, the evidence was sufficient to support Ms. Kirsch's conviction for reckless endangerment.

B. Ms. Kirsch's Convictions For First-Degree Child Abuse Resulting In Death And First-Degree Child Abuse Resulting In Severe Physical Injury Should Merge For Sentencing.

Finally, Ms. Kirsch asks us to order a new sentencing hearing because, she says, the court failed to merge her convictions of first-degree child abuse resulting in death and first-degree child abuse resulting in severe physical injury when the evidence of both convictions stemmed from the same acts. The State counters that these counts should not be merged because the child abuse convictions are based on separate acts: neglect and trauma. Under the circumstances of this case, where the combination of neglect and trauma underlie all of the convictions and the evidence doesn't permit a precise mapping of harms and counts, we agree with Ms. Kirsch, vacate her sentences for those counts, and remand for resentencing.

Common law double jeopardy principles forbid multiple convictions for the same offense. *Kyler v. State*, 218 Md. App. 196, 225 (2014). Otherwise known as the merger doctrine, "[1] when a defendant is convicted of two offenses based on the same act or acts

and [2] one offense is a lesser-included offense of the other[,]" a court may not impose separate sentences. *Id.* (cleaned up). On the face of CL § 3-601(b)(1), the two forms of first-degree child abuse share the same essential elements, differing only with regard to whether the victim survived the abuse. In a situation like this, where the injuries resulting from the acts of neglect and trauma can't be separated into distinct lethal and non-lethal injuries, first-degree child abuse resulting in severe physical injury can be a lesser included offense of first-degree child abuse resulting in death.

The question, then, is whether the convictions are grounded in the same acts or transactions, and under these circumstances, they were. The evidence at trial indicated that when Matthew Jr. was admitted into care, he was malnourished and had suffered severe head trauma. At birth, Ms. Kirsch estimated he weighed six or seven pounds. In the nine days of his life, Matthew, Jr. was never taken to the hospital, despite suffering from tremors and resisting attempts to feed him, and at the time of his death, he weighed 4.5 pounds and looked "emaciated." The autopsy revealed a subgaleal hemorrhage on the left side of the back of Matthew Jr.'s head, other subarachnoid and subdural hemorrhages, fresh blood covering the right side of his brain and the base of his skull, and hemorrhages on the left side of his lower back and around the spinal cord.

The medical examiner who conducted Matthew, Jr.'s examination, Dr. Aronica, identified two proximate causes of Matthew, J.'s death—he died as a result of trauma inflicted to his head, but malnourishment accelerated his death:

> [DR. ARONICA]: [T]his child has had trauma that can cause death. This child has malnutrition that also pushed this child

> into death as well. And the two together caused the death.
>
> [STATE]: Can you separate the malnutrition and the trauma for the manner and cause of death for this child?
>
> [DR. ARONICA]: No.
>
> [STATE]: Why can't you separate them?
>
> [DR. ARONICA]: Because I don't know that this child -- the head trauma comes and I don't know that this child could not have lived a little longer, or possible [sic] lived with the head trauma had he not been so poorly nourished and in the state that he was already in. It definitely caused him to die even seconds or minutes sooner.

Under the circumstances of this case, the overlapping proximate causes of Matthew, Jr.'s death intertwine the two charges and, in our view, require these convictions to be merged for sentencing purposes. Accordingly, we vacate the sentences for first-degree child abuse resulting in death and first-degree child abuse resulting in severe physical injury and remand for resentencing consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED EXCEPT AS TO THE SENTENCES FOR FIRST DEGREE CHILD ABUSE RESULTING IN DEATH AND FIRST-DEGREE CHILD ABUSE RESULTING IN SEVERE PHYSICAL INJURY, WHICH ARE VACATED AND THE CASE REMANDED FOR RESENTENCING CONSISTENT WITH THIS OPINION. COSTS ASSESSED 80% TO APPELLANT AND 20% TO THE MAYOR AND CITY COUNCIL OF BALTIMORE.