Circuit Court for Montgomery County
Case No. 130127C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 366

September Term, 2017

MARTA OBANDO

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: May 11, 2018

A jury in the Circuit Court for Montgomery County (McCormick, J., presiding), convicted Appellant, Marta Obando, of sexual abuse of a minor and child neglect. The court imposed concurrent sentences of five years; suspending all but six months, to be followed by five years of probation. Appellant must register as a sex offender during her lifetime pursuant to § 11–701(1)(l) & (q) of the Criminal Procedure Article. The instant appeal followed, wherein Appellant asks the following questions for our review:

> 1. Did the trial court's instruction that Marta Obando "omitted or failed to prevent molestation or exploitation of [her daughter] when it was reasonably possible to act, and when a duty to do so existed," fail to impart upon the jurors the knowledge element of the offense of abuse by a parent by omission?
>
> 2. Did the trial court err by imposing separate sentences for sexual abuse of a minor and child neglect?

FACTS AND LEGAL PROCEEDINGS

Notwithstanding that the State contended below that Appellant's son, D.R., rather than Appellant, sexually abused his sister, G.R., between January 1, 2013 and March 4, 2016, when G.R. was between three and six years old, the State's theory was that Appellant was guilty of the offense of sexual abuse of her daughter because she failed to prevent the abuse.

Appellant has four children, three boys and one girl, G.R. On March 9, 2016, during a class on body safety, G.R., age 7, told a teacher at the Hyland Elementary School that her brother D.R., age 16, would touch her inappropriately. The teacher, Courtney Thompson, testified that, when she said to the students, that "no one should ever ask you to touch their

private parts or touch you in your private parts," G.R. raised her hand and said, "it happens to me all the time." G.R. told Thompson "this happens with my brother, [D.R.]," that she had told her mother and that her mother had told her brother to stop.

That same day G.R. was interviewed by Laura Erstling, who is an investigative social worker employed by the Montgomery County Department of Health and Human Services ("DHHS"), and Detective Andrea Schendel. At that time, G.R. said that D.R. touched her private part over her clothes "a lot." She said that her mother and father had told him to stop, that she had told her mother about it "a lot of times," and that her mother had responded, "I'll tell [D.R.] to stop."

When asked, "where is mom when this happens," G.R. responded, "She's in her room." She said that the touching started "[w]hen [she] was like three." G.R. said that her brother had asked her to touch his private part "one time," and that she had done so over his clothes. G.R. was asked, "[w]hat makes [D.R.] stop touching your private part or your butt?" G.R. responded, "[m]om."

At the trial, G.R. testified, "[D.R.] never touched me." When G.R. was asked, "did you tell your mom that [D.R.] touched you in a way that you didn't like?" she testified, "No." G.R. recalled telling Erstling that her brother had touched her in a way that she did not like. G.R. testified that she had said that "because Laura and the other person confused me . . . ."

At the trial, D.R. denied the allegations. The State introduced into evidence a recording (and transcript) of the police interrogation following D.R.'s arrest on March 9,

2016. During the interrogation, D.R. initially denied the allegations, but later said that he had touched G.R.'s vagina and had twice partially inserted his finger into her vagina. He said that the last time was "like a month ago." He said that G.R. had touched his penis a couple of times. He said that his mother "knows everything," adding, "[w]e told her everything about the touching." He said that G.R. had told their mother from the start and that Appellant told him several times "to never touch children like that . . . and to never do it again."

The defense called five witnesses. Twenty-one-year-old Edwin R., who is Appellant's eldest son, testified that the family had lived in the same house for over eight years. He testified that "all the guys" slept in two rooms that were connected and that his mother and sister shared a separate bedroom. He testified that his sister and D.R. had never slept in the same room and that his mother is "very protective" of all her children. He testified that he had never seen the alleged abuse.

Daniel R., who is the father of Appellant's children, testified that he had been in a relationship with Appellant for twenty-five years. He testified that, after G.R. was born, they had separated, but continued to live in the same house with the children. He testified that he had never heard his daughter or his son say anything regarding the allegations to Appellant. He testified that he would pick up his daughter from school because Appellant worked until 6:00 p.m.

With the aid of an interpreter, Appellant testified that she was working in Washington, D.C., taking care of a newborn, when she received a call from Child

Protective Services on March 9th at 4:30p.m. She could not leave the baby she was caring for, so she called her boss and asked that they come home, so that she could attend to the matter with her children. According to Appellant, she felt desperate when she talked to the police later that day. She told police she did not know about the allegations. She testified that her children had not said anything to her about the allegations, and that, "I felt pretty sad. I felt very sad. I go, how is it possible that my own son has been abusing the girl?" When asked about her reaction to the allegations made by the police, she testified, "I never believed it, because I [] never saw any and the girl had never told me those things." She was devastated when her son confirmed what the police had said.

She testified that, in 2012, when her daughter was three, she had contacted the police to investigate her daughter's report of abuse by her babysitter. She testified that she had filed a report against her daughter's father "because [she] thought he was the one who was abusing the girl." At that time, Child Protective Services told her "that there was no abuse."

The defense called two character witnesses, Ana Escobar, who had known Appellant for ten years, and Roberto Cortez, a priest, who had known her for over twenty years. They described Appellant as "a good mother" who was protective of her children and as an honest and good person.

DISCUSSION

I.

Appellant first contends that the trial court's instruction that Appellant "omitted or failed to prevent molestation or exploitation of [her daughter] when it was reasonably

possible to act, and when a duty to do so existed," failed to impart upon the jurors the knowledge element of the offense of abuse by a parent by omission.

The State responds that the trial court did not abuse its discretion when it declined to give an additional instruction on the knowledge requirement. The State maintains that the knowledge requirement was fairly covered by the instructions given. The State agrees with Appellant that an "awareness that molestation or exploitation of a minor is occurring is a necessary predicate for liability under *Degren* [*v. State*, 352 Md. 400 (1999)]." The State also notes that the trial court was aware of such molestation, as well, when it reasoned that "a duty doesn't exist unless they know about [it]." Accordingly, "it could not have been 'reasonably possible' for [Appellant] to take action to prevent the abuse, nor could a 'duty' for her to do so have arisen, unless [Appellant] knew that the abuse was occurring." Therefore, the State maintains that the instruction "drawn from *Degren*" which included a duty, implicitly and fairly covered the knowledge requirement.

Md. Rule 4–325 governs the trial court's instruction to the jury. Subpart (c) provides that, "[t]he court may, and at the request of any party shall, instruct the jury as to the applicable law . . . . The court need not grant a requested instruction if the matter is fairly covered by instructions actually given."

> Rule 4–325(c) has been interpreted consistently as requiring the giving of a requested instruction when the following three-part test has been met: (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given.

Dickey v. State, 404 Md. 187, 197–98 (2008) (citations omitted).

> Maryland criminal law prohibits sexual abuse of a minor by an individual in a position of trust or authority over that minor. A parent, a person who has permanent or temporary care or custody or responsibility for the supervision of a minor, a household member, or a family member "may not cause sexual abuse to the minor." Thus, the three elements that the State must prove are: (1) that the defendant is a parent, family or household member, or had care, custody, or responsibility for the victim's supervision; (2) that the victim was a minor at the time; and (3) that the defendant sexually molested or exploited the victim by means of a specific act.

Schmitt v. State, 210 Md. App. 488, 496 (2013) (citing Md. Code Ann., Crim. Law ("C.L.") § 3–602(b).

"When examining the breadth of conduct that . . . falls within the current iteration of the child abuse statute, [the Court of Appeals] consistently ha[s] observed that the Legislature intended for the statute to cover a wide range of conduct." *Crispino v. State*, 417 Md. 31, 43 (2010).

> In *Degren v. State*, 352 Md. 400 (1999), the issue presented involved determining whether a wife could be convicted of child sexual abuse under [the statute] for her failure to prevent the sexual molestation or exploitation of a minor child by her husband. "[T]aking into consideration the purpose of the child abuse statute, the amendments in which the Legislature generally expanded the scope of liability and actions constituting child abuse . . . and the modern trend in broadly recognizing and punishing all forms of child abuse," [the Court] *held that Degren's failure to prevent the abuse constituted an "'act that involved molestation or exploitation of a child*.'" In so holding, [the Court] noted that the "word 'involves' connotes a broad sense of inclusion, such as an act relating to sexual molestation or exploitation," and "*expand[ed] the scope of the word 'act'* from just the deed of molestation or exploitation into something done by the accused that *relates to the molestation or exploitation*." [The Court] further observed that, "[b]y clarifying that sexual abuse need not necessarily lead to physical injuries in order to be prosecuted, the [L]egislature recognized the extensive emotional, psychological, or physical damage that sexual abuse can cause a child," and "through its various changes to the language of the statute, consistently expanded its scope and applicability to better achieve the goal of protecting 'children who have been the subject of abuse.'

Crispino v. State, 417 Md. 31, 43–44 (2010) (emphasis supplied) (citing *Degren*, 352 Md.

at 419, 421, 424).

To reiterate, the *Degren* Court held that, "the definition of sexual abuse in [the child abuse statute] contemplates not just an affirmative act in directly molesting or exploiting a child, but one's omission or failure to act to prevent molestation or exploitation when it is reasonably possible to act and when a duty to do so . . . exists." 352 Md. at 424–25.

In support of its position, the Court cited several cases from foreign jurisdictions. In *State v. Walden*, 293 S.E.2d 780, 785 (N.C. 1982), the Supreme Court of North Carolina held as follows:

> Although our research has revealed no controlling case in this jurisdiction on the question of a parent's criminal liability for failure to act to save his or her child from harm, the trend of Anglo-American law has been toward enlarging the scope of criminal liability for failure to act in those situations in which the common law or statutes impose a responsibility for the safety and well-being of others. *Thus, it has generally been thought that it is the duty of a parent who has knowledge that his or her child of tender years is in danger to act affirmatively to aid the child if reasonably possible to do so.*

(Emphasis supplied)(citations omitted).

In the instant case, the trial court read the following instruction to the jury:

> Sexual abuse of a child is sexual molestation or exploitation of a child under 18 years of age, caused by a parent of a child. In order to convict [Appellant] of sexual abuse of a child, the State must prove; number 1, that [D.R.] sexually abused [G.R.] by a sexual offense; number 2, that at the time of the abuse, [G.R.] was under 18 years of age; number 3, that at the time of abuse, [Appellant] was a parent of [G.R.]; and that [Appellant] omitted or failed to prevent molestation or exploitation of [G.R.] when it was reasonably possible to act, and when a duty to do so existed.

In reviewing the third prong of the three-part test provided by Rule 4–325(c), we are persuaded that the instruction, as given, fairly covered the requested knowledge

requirement. C.L. § 3–602(b) provides three prongs for the criminal elements of child abuse and, in the instant case, it is the third prong, *i.e.* "that the defendant sexually molested or exploited the victim by means of a specific act[,]" at issue. *Degren* expressly held that it was not just affirmative acts of child abuse that would satisfy a conviction; rather, "one's omission or failure to act to prevent molestation or exploitation when it is reasonably possible to act and when a duty to do so . . . exists[,]" could also support a conviction for child abuse under the statute. 352 Md. at 425. As illustrated above, the trial court's instruction to the jury mirrors the language used by the Court of Appeals in formulating its holding.

Furthermore, it logically follows that one cannot have a duty without knowledge. Even in a negligence framework, duty requires a type of knowledge, *i.e.*, foreseeability, that a duty would be owed. Black's Law Dictionary (10th ed. 2014), defines "knowledge," in part, as "[a]n awareness or understanding of a fact or circumstance[.]" It also defines foreseeability as "[t]he quality of being reasonably anticipatable." Although "foreseeability" and "anticipate" require a certain level of consideration and ability to forestall a future event, there is a knowledge or thought element to both. Merriam Webster defines "anticipate," in part, as "to give advance thought, discussion, or treatment to" and also, as an intransitive verb, as "to speak or write in knowledge or expectation of later matter[.]"[1]

[1] MERRIAM WEBSTER DICTIONARY, "Anticipate," https://www.merriam-webster.com/dictionary/anticipatable (last visited April 18, 2018).

Moreover, although a parent's duty to protect his or her child is ever present and does not simply engage when the parent has knowledge of abuse, it would be unreasonable to expect a parent to act if he or she did not have knowledge of the abuse.

Accordingly, we hold that the knowledge requirement was fairly covered by the jury instruction given and, therefore, the trial court did not err in denying appellant's requested instruction.

II.

Appellant's final contention is that the trial court erred in imposing separate sentences for sexual abuse of a minor and child neglect. Citing language from the Criminal Law Article, section 3–601.2, Appellant alleges that "[i]t is clear . . . that the General Assembly did not intend to establish a separate penalty for a conviction if based on evidence that is substantially identical to evidence required to prove another crime; here sexual abuse of a minor." Therefore, according to Appellant, "because the evidence required to prove each crime was substantially identical, the conviction for neglect of a minor should have merged into the convictions for sexual abuse of a minor for sentencing purposes."

The State responds in agreement with Appellant that her sentence for criminal child neglect should merge with her sentence for sexual abuse of a minor.

> The merger of convictions for purposes of sentencing derives from the protection against double jeopardy afforded by the Fifth Amendment of the federal Constitution and by Maryland common law. Merger protects a convicted defendant from multiple punishments for the same offense. Sentences for two convictions must be merged when: (1) the convictions are based on the same act or acts, and (2)

> under the required evidence test, the two offenses are deemed to be the same, or one offense is deemed to be the lesser included offense of the other.

Brooks v. State, 439 Md. 698, 737 (2014) (citations omitted).

"A failure to merge a sentence is considered to be an "illegal sentence" within the contemplation of the rule." *Pair v. State*, 202 Md. App. 617, 624 (2011). Md. Rule 4–345(a)[2] provides that, "[t]he court may correct an illegal sentence at any time[,]" including when raised for the first time on appeal.

C.L. § 3–602 governs the sexual abuse of a minor and subpart (d) provides that, "[a] sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for: (1) any crime based on the act establishing the violation of this section; or (2) a violation of § 3-601 of this subtitle involving an act of abuse separate from sexual abuse under this section.

C.L. § 3–602.1 governs criminal child neglect and subpart (d) 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."

In the instant case, Appellant notes that C.L. § 3–602.1 has an express merger provision, where "the General Assembly 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; here, sexual abuse of a

[2] Amended by 2018 MARYLAND COURT ORDER 0002 (C.O. 0002).

minor."

The State also adds that legislative history confirms this reading of the statute. The State notes that, "[t]he criminal child neglect statute was enacted in 2011 and has not been subsequently amended[,]" and that earlier floor reports for the Senate's version of the bill stated an example of when offenses would merge: "So, for example, a conviction for neglect would merge into a conviction for abuse arising from the same facts."[3]

We agree with both parties that Appellant's conviction for criminal child neglect was based on evidence "substantially identical" to the evidence used to sustain her conviction for sexual abuse of a minor and, therefore, Appellant's sentences for criminal child neglect should merge with her sentence for sexual abuse of a minor.

We also note, as does the State, that the statute for sexual abuse of a minor contains an *anti-merger* provision and, usually, sentences under C.L. § 3–602(d) do not merge with other sentences for other convictions.

However, as the State argues, "[u]nder the standard rules of statutory construction, to the extent there is a conflict between . . . two provisions, the later enacted provision . . . prevails." *Patton v. Wells Fargo Financial Md., Inc.*, 437 Md. 83, 107 (2014) (citation omitted). As stated, *supra*, the statute for criminal child neglect, C.L. § 3–602.1(d), was enacted in 2011.[4] The statute for sexual abuse of a minor, C.L. § 3–602(d), was most

[3] S.B. 178 (Md. 2011), Sen. Jud. Proc. Cmte. Floor Report at 2.

[4] Added by Acts 2011, c. 398, § 1, eff. Oct. 1, 2011; Acts 2011, c. 399, § 1, eff. Oct. 1, 2011.

recently enacted in 2002 and amended in 2003.[5] Accordingly, the merger provision in the criminal child neglect statute, the last to be enacted, controls.

Additionally, we are persuaded by the State's argument that, if statutory construction does not support merger, the Rule of Lenity does. "If we are uncertain as to what the Legislature intended, we turn to the so-called 'Rule of Lenity,' by which we give the defendant the benefit of the doubt." *Latray v. State*, 221 Md. App. 544, 555 (2015) (quoting *Walker v. State*, 53 Md. App. 171, 201 (1982)).

Accordingly, we hold that Appellant's sentence for her conviction of criminal child neglect must merge with her sentence for her conviction of sexual abuse of a minor.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART; CASE REMANDED FOR SENTENCE TO BE MERGED.
ONE HALF OF COSTS TO BE PAID BY APPELLANT; ONE HALF OF COSTS TO BE PAID BY MONTGOMERY COUNTY.

[5] Added by Acts 2002, c. 273, § 2, eff. Oct. 1, 2002. Amended by Acts 2003, c. 167, § 1, eff. Oct. 1, 2003.