UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0654

September Term, 2015

DEBRA MARY CUSSEN

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: November 18, 2016

The State charged appellant Debra Cussen with 24 counts of child abuse and related offenses. At the end of its case, the State voluntarily dismissed 15 of the 24 counts, and a judge in the Circuit Court for Talbot County found Ms. Cussen guilty on the remaining nine. She appealed. We affirm her convictions on six of the nine counts and reverse on the remaining three.

FACTUAL AND PROCEDURAL HISTORY

In 2013, Ms. Cussen and her adult son, Matthew Franey, lived together in Trappe, Maryland, with Mr. Franey's three-year-old son, C., and C.'s half-brother.

In March of 2013, Mr. Franey traveled to Georgia to retrieve Ms. Cussen's five other grandchildren, who ranged in age from six to 13. The grandchildren included D. (who was 13) and A. (who was 10). The Georgia Department of Family and Child Services had removed the children from the home of their mother, who is Ms. Cussen's daughter.

Over the next several months, Ms. Cussen, Mr. Franey, his two children, and Ms. Cussen's other five grandchildren lived in the house in Trappe. Mr. Franey's girlfriend, Pamela Snedden, was frequently present in the house, as was the babysitter, Carla Siljeholm.

On August 8, 2013, Katie Russ, a social worker employed by the Talbot County Department of Social Services, arrived at the home to investigate a report that the children had been physically abused and left alone for long periods of time. Ms. Russ described the household and children as composed and orderly, but said that the children, who were alone with no adult supervision, were "very fearful." She spoke with the oldest

child, 13-year-old D., and developed some concerns about the children's welfare. When Ms. Cussen arrived at the house a few minutes later (apparently after receiving a call from D.), she told Ms. Russ that she was strict, but that she did not beat the children. Ms. Cussen volunteered that D. has a "smart mouth." Ms. Russ observed Ms. Cussen speaking to the children, including D., in a "very harsh" tone, "elevated in volume."

The Child Protective Services Unit of the Department of Social Services decided to remove the seven children from Ms. Cussen's home. On the following day, August 9, 2013, Ms. Russ returned to the home, with her supervisor and a State Policeman. When they arrived, a woman who identified herself as the children's aunt was there, but she left quickly, leaving 13-year-old D. in charge of the children. As the children were preparing to board vans to take them from the home, Ms. Cussen drove up to the house at a high rate of speed. Some of the children exclaimed, "Here comes Grandma; get in the van," as they ran to the vans. Ms. Cussen was so irate and belligerent that the State Policeman called for backup.

After an investigation, the State charged Ms. Cussen with 24 counts, including second-degree child abuse, second-degree assault, and related offenses. Ms. Cussen opted for a bench trial, which occurred on December 9, 2014.

At the one-day trial, the prosecution was hampered by the unavailability of the children, who had apparently returned to Georgia. As a consequence of the children's absence, the State relied primarily on the testimony of Ms. Snedden, the girlfriend, and Ms. Siljestrom, the babysitter.

Ms. Snedden described an occasion on which 13-year-old D. was "called down to the table" because he had been "misbehaving and acting up." Ms. Snedden claimed that Ms. Cussen began "yelling and slamming things down on the table." According to Ms. Snedden, Ms. Cussen was "yelling at [D.] for different things that he had done and was trying to lecture him about appropriate behavior," but "it was a lot more yelling than it was anything else." Ms. Snedden testified that Ms. Cussen "slammed" "something" on the table "probably about a foot, a foot and a half away from [D.]" and that D "appeared nervous and scared and . . . looked visibly upset."

Ms. Siljeholm, the children's babysitter, briefly discussed two, separate incidents in which she saw Ms. Cussen "grab [10-year-old] A.'s hair and put him in the corner and [three-year-old] C.'s hair and put him in the corner." When asked to describe the incidents in detail, Ms. Siljeholm stated that, from what she could remember, the children had been misbehaving. She could not remember the cause of the misbehavior or whether the children were yelling at Ms. Cussen or talking back to her. Ms. Siljeholm reported that the children reacted by "scream[ing] and cry[ing]." On cross-examination, however, Ms. Siljeholm stated that she did not see Ms. Cussen pull out any hair, she observed no injuries, she took no pictures, and she felt no need to call the police or report the incidents to the authorities.

Ms. Siljeholm also stated that on one occasion A. had failed to clean his room and, when instructed to do so by Ms. Cussen, responded that he was "not her maid." Ms. Cussen "smacked [A.] across the face and grabbed him by the throat." She had "one hand around [A.'s] throat and was like slightly lifting him up." A.'s feet "w[ere]n't off

the ground, but you could see his face turn red and he was having trouble breathing." Ms. Cussen "let go a couple of seconds later and continued to yell[,] and eventually [A.] did what she asked." Over an objection, the court permitted Ms. Snedden to testify that A. had told her that "his grandmother had smacked him in the back of the head and had yelled at him and thrown things at him and had called him stupid on many occasions and told him that he should be grateful for everything that she's given him."

Ms. Snedden recalled seeing red "marks on [three-year-old C.'s] neck," which "almost resembled . . . hickies," but "were all around his neck." Nonetheless, no one offered any explanation for the marks, or anything linking them to Ms. Cussen. Aside from the reference to the unexplained marks on C.'s neck, no one testified that any of the children showed any signs of physical injury of any significant duration.

At the end of the State's case, it conceded that it lacked sufficient evidence to proceed on 15 of the 24 counts against Ms. Cussen. After the court dismissed those counts, the defense rested. At that point, the court heard closing arguments on the remaining counts and found Ms. Cussen guilty on all nine. The convictions are summarized in the following chart:

COUNT	**CHARGE**	**VICTIM**	**SENTENCE**
1	Second-Degree Assault (slamming table)	D.	Thirty days, all suspended, consecutive to Counts 4, 5, 7, and 9
4	Second-Degree Assault (hair pulling)	A.	Two years, all but 90 days suspended

5	Second-Degree Child Abuse (choking)	A.	Three years, all but 90 days suspended, concurrent with Count 4
6	Second-Degree Assault (choking)	A.	None imposed
7	Second-Degree Child Abuse (hair pulling)	A.	Three years, all but 90 days suspended, concurrent with Counts 4 and 5
8	Reckless Endangerment (choking)	A.	None imposed
9	Second-Degree Assault (slapping)	A.	Three years, all but 90 days suspended, concurrent with Counts 4, 5, and 7
19	Second-Degree Child Abuse (hair pulling)	C.	Sixty days, all suspended, consecutive to Counts 4, 5, 7, and 9
20	Second-Degree Assault (hair pulling)	C.	None imposed

In addition, the court ordered three years of supervised probation after Ms. Cussen's release from incarceration.

As the chart illustrates, the court did not mention or impose a sentence for counts 6, 8, and 20. The commitment record addresses only counts 1, 4, 5, 7, 9, and 19, and the docket erroneously reflects a verdict of "not guilty" for counts 6, 8, and 20.

Ms. Cussen appealed.[1]

[1] The court's failure to impose a sentence on Counts 6, 8, and 20 prompted a question about whether the appeal is proper. If a court inadvertently (continued…)

QUESTIONS PRESENTED

Ms. Cussen presents three questions:

1. Did the trial court err in admitting hearsay into evidence?

2. Did the trial court err in admitting irrelevant evidence, including other bad acts testimony?

3. Was the evidence sufficient to support Ms. Cussen's convictions for second-degree assault, child abuse, and reckless endangerment?

DISCUSSION

I. HEARSAY

On redirect examination, the State elicited Ms. Snedden's testimony that A. had told her that "his grandmother had smacked him in the back of the head and had yelled at him and thrown things at him and had called him stupid on many occasions and told him that he should be grateful for everything that she's given him." In eliciting that testimony, the State appears to have been attempting to address Ms. Snedden's testimony, on cross-examination, that A. had "anger issues." Ms. Cussen contends that the

imposes no sentence, this Court has suggested that an appeal is premature. *See Moore v. State*, 198 Md. App. 655, 706-07 (2011); *Sands v. State*, 9 Md. App. 71, 79 (1970). If, on the other hand, the court intentionally imposes no sentence on one or more but fewer than all of the counts, the appeal is proper. *See Moore*, 198 Md. App. at 706-07; *Sands*, 9 Md. App. at 79. In our judgment, the court intentionally imposed no sentence on Counts 6, 8, and 20. Counts 6 and 8 involve the less serious offenses (second-degree assault and reckless endangerment) that arose from the choking of A.; the court had already sentenced Ms. Cussen for the most serious offense arising from that incident – Count 5, on which she had been convicted of second-degree child abuse. Similarly, Count 20 involves the less serious offense (second-degree assault) that arose from the pulling of C.'s hair; the court had already sentenced Ms. Cussen for the most serious offense arising from that incident – Count 19, on which she had been convicted of second-degree child abuse. Because we conclude that the court intentionally imposed no sentence on Counts 6, 8, and 20, we have no doubt that the appeal is properly before us.

testimony was inadmissible hearsay and that its admission tainted the proceedings as to amount to reversible error.

The parties engaged in a protracted procedural skirmish before the court heard what Ms. Snedden said A. had said. Initially, the State asked Ms. Snedden whether A. had told her why he was angry, but she said that she did not remember. Over defense objections, Ms. Snedden testified that A. had told her what Ms. Cussen had done to him, but that she did not remember what A. said about what Ms. Cussen had done.

During a recess, the State refreshed Ms. Snedden's recollection by having her listen to a portion of a recorded interview that she had given. After the recess, the State attempted to introduce the recorded interview through a witness other than Ms. Snedden, and the defense objected on numerous grounds. The court observed that no one had made any proffer as to the actual contents of the statement, but it admitted a redacted version that referred only to what A. said Ms. Cussen had done. The record, however, contains no indication that the court stopped to review the statement at this or any other time before delivering its verdict.

The State recalled Ms. Snedden, erroneously contending that by eliciting testimony about A.'s anger issues, the defense had "opened the door" to her account of what A. had said that his grandmother had done to him.[2] Defense counsel responded that Ms. Snedden's statement did not draw a causal connection between Ms. Cussen's alleged

[2] With admirable candor, the State acknowledges that a party can open the door to *competent* evidence that would otherwise be irrelevant, but a party cannot open the door to *incompetent* evidence, such as hearsay. *See Clark v. State*, 332 Md. 77, 84-85 (1993).

conduct and A.'s anger. The court expressed uncertainty about where the State was going and whether the State could draw a causal connection, but seemed to state that it had to hear the testimony to determine its admissibility:

> THE COURT: . . . I'm not quite sure where this is going. You're arguing it's disconnected and goes nowhere. State's arguing otherwise[,] so I'm going to allow it. If at the end of the day I agree with you[,] I'm going to disregard it. If at the end of the day I agree with the State that . . . there's a connection and it's admissible[,] then I'll keep it, okay?

A moment later, the court reminded counsel that "this is a court trial[,] not a jury trial."

After the court announced that it would hear Ms. Snedden's account of what A. had said, the State asked: "What did A. tell you?" She responded: "A. told me that his grandmother had smacked him in the back of the head and had yelled at him and thrown things at him and had called him stupid on many occasions and told him that he should be grateful for everything that she's given him."

On its face, this statement does not establish that A.'s "anger issues" were attributable to Ms. Cussen's alleged conduct. Hence, although neither side requested a formal ruling on the statement's admissibility, it is most likely that the court did what it said it would do in the absence of evidence of a causal connection – it disregarded the statement. Because trial judges are presumed to know the law and to apply it properly, they are not required to set out a detailed account of each and every step of their thought processes. *See*, *e.g.*, *State v. Chaney*, 375 Md. 168, 180-81 (2003).

Even assuming that the court did not disregard the statement, we would find any error in admitting it to be harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md.

638, 659 (1976). In response to Ms. Cussen's new trial motion, the court articulated the evidence on which it relied in reaching its findings of guilt, making it clear in the process that it did not rely in any way on Ms. Snedden's account of what A. had said. We take the court at its word. While the erroneous admission of such a hearsay statement might have required a new trial had the case been tried before a jury, a reversal is unwarranted and unnecessary after a bench trial in which the court disclaims any reliance on the statement. *See*, *e.g.*, *State v. Hutchinson*, 260 Md. 227, 236 (1970) (affirming criminal conviction in bench trial in which trial judge stated on the record that he was completely disregarding defendant's inadmissible confession); *see also Nixon v. State*, 140 Md. App. 170, 189-91 (2001) (finding that admission of inadmissible hearsay was reversible error only on counts on which trial court apparently did rely on it and harmless error on counts on which said that it did not rely on hearsay); *id.* at 189 ("[d]eference has always been given to a trial judge's specific statement on the record that the court was not considering certain testimony or evidence").[3]

[3] The State argues that Ms. Cussen did not preserve this issue, because her final objection, in the protracted debate about the admissibility of Ms. Snedden's statement, did not concern hearsay, but rather the lack of a causal connection between A.'s anger and his grandmother's alleged conduct. The argument is unpersuasive. By the time the court allowed Ms. Snedden's hearsay statement, it had gotten past the issue of hearsay because of a (mistaken) impression that Ms. Cussen could open the door to hearsay. *See supra* n. 2. Ms. Cussen did not waive her hearsay objection by raising additional objections after the court had erroneously rejected her first one.

II. MS. RUSS'S TESTIMONY

Ms. Cussen contends that the court committed reversible error in allowing Ms. Russ, the social worker, to testify about the reasons for the investigation of the Cussen household and to state that Ms. Cussen had a "significant" history with Child Protective Services. We reject both contentions.

A. Reasons for the Investigation

Ms. Russ was the State's first witness. Near the beginning of her testimony, the State asked "what occasioned" the investigation. Ms. Cussen objected, and the State responded that it was not offering the testimony to prove the truth of the matters asserted, but to establish the reason why Ms. Russ undertook the investigation.

After Ms. Cussen offered to stipulate that Ms. Russ "took an investigation," the court overruled the objection. Ms. Russ testified that her investigation was occasioned by "[c]oncerns that six children were being left alone for long periods of time and that there had been physical abuse incidents such as choking in the house." If offered for the truth of the matters asserted, Ms. Russ's statement embodied the inadmissible hearsay statement of an unidentified informant; if offered for a purpose other than for its truth, such as the purpose of establishing why Ms. Russ did what she did, the statement was not inadmissible hearsay.

"[A] relevant extrajudicial statement is admissible as nonhearsay when it is offered for the purpose of showing that a person relied on and acted upon the statement and is not introduced for the purpose of showing that the facts asserted in the statement are true." *Graves v. State*, 334 Md. 30, 38 (1994). In a criminal case, however, an

extrajudicial statement may be relevant to the defendant's guilt, as well as the reason why a government official took some action. In *Graves*, for example, a detainee's extrajudicial statement that Graves had been his accomplice was relevant both for the limited, nonhearsay purpose of establishing why a police officer had included Graves's picture in a photo array and for the purpose of establishing Graves's guilt. If offered as proof of Graves's guilt, the statement would be inadmissible hearsay. *Id.* at 43.

Because of the danger that a jury might misuse such an extrajudicial statement for the impermissible hearsay purpose of proving the defendant's guilt, a court, on objection, should not permit the State to offer a detailed explanation of why an official took some action. For example, in *Graves*, it would have sufficed for the officer to testify that he included Graves's picture in a photo array because of "information received," rather than because Graves's alleged accomplice had implicated him in the crime. *Id.* at 42.

Graves, however, does not apply in this case, because Cussen elected a bench trial. "The assumed proposition that judges are men [and women] of discernment, learned and experienced in the law and capable of evaluating the materiality of evidence, lies at the very core of our judicial system." *State v. Babb*, 258 Md. 547, 550 (1970). We assume that in a bench trial a judge can hear evidence that is highly prejudicial to a defendant (such as a confession), determine that it is inadmissible and must be excluded, and still disregard that evidence in reaching a guilty verdict. *State v. Hutchinson*, 260 Md. at 236. Yet, if we accept that judges can completely ignore evidence that they have ruled inadmissible, we should also accept that they can consider admissible evidence solely for the limited purposes for which it could properly be offered, and not for some other,

improper purpose. It follows that in this bench trial the court did not err in allowing Ms. Russ to offer a more expansive explanation for her investigation than she might otherwise have been able to offer in a jury trial.[4]

B. History with Child Protective Services

At the outset of her cross-examination of Ms. Russ, defense counsel attempted to establish that Ms. Cussen's irate and belligerent reaction to the removal of the children was not out of the ordinary for parents whose children are being forcibly removed from the home. In addition, in the State's interpretation of her questions, defense counsel attempted to imply that the children were well-behaved in Ms. Russ's presence because of their prior experiences with the authorities when they (or, more precisely, five of them) had been removed from their mother's home in Georgia.

On redirect, the State asked Ms. Russ about Ms. Cussen's prior experience with the removal of children from her home. In response to a general objection, the State asserted that Ms. Cussen had "opened the door" to an inquiry about Ms. Cussen's prior experience and its effect on her conduct because the defense had drawn a connection between the children's prior experiences and their conduct. After the court stated that it would allow the question, defense counsel protested that "[w]hat these children knew or didn't know is totally different from what may or may not be relevant to a client, my client or anybody else, any other adult who was there." The State responded with a

[4] Ms. Cussen complains that she offered to stipulate that the investigation was lawful. She did not. She offered to stipulate only that Ms. Russ "took an investigation."

variant of its argument about "opening the door," and the court reiterated that it would allow the question. In response, Ms. Russ testified that some of Ms. Cussen's biological children, including the mother of the five grandchildren from Georgia, had been removed from her care. She did not specify why the children had been removed.

Ms. Cussen argues that the removal of her biological children was irrelevant to whether she physically abused her grandchildren and that Ms. Russ's testimony amounted to evidence of other wrongs, which are inadmissible under Rule 5-404(b). The State contends that Ms. Cussen has preserved an objection only on the ground of relevance.

We disagree with the State's contention about preservation. In response to the question about her prior experiences, Ms. Cussen asserted a general objection, which "ordinarily preserves for appellate review all grounds which may exist for the inadmissibility of the evidence." *Boyd v. State*, 399 Md. 457, 476 (2007). Only after the court overruled the objection, did defense counsel mention the concept of relevance. We do not think that Ms. Cussen abandoned all grounds other than relevance, including an objection to evidence of other wrongs, simply because she mentioned relevance in unsuccessfully arguing that the court should reconsider a ruling that it had already made.

Under Rule 5-404(b), "[e]vidence of other crimes, wrongs, or acts . . . is not admissible to prove the character of a person in order to show action in conformity therewith." "The primary concern underlying the Rule is a 'fear that jurors will conclude from evidence of other bad acts that the defendant is a "bad person" and should therefore be convicted, or deserves punishment for other bad conduct and so may be convicted

even though the evidence is lacking.'" *Hurst v. State*, 400 Md. 397, 407 (2007) (quoting *Harris v. State*, 324 Md. 490, 496 (1991)). In addition, the rule "plays a role similar to the prohibition against unfairly prejudicial evidence, *i.e.*, to prevent the jury from 'developing a predisposition of guilt' based on unrelated conduct of the defendant." *Smith v. State*, 218 Md. App. 689, 709 (2014) (quoting *Sinclair v. State*, 214 Md. App. 309, 334 (2013) (in turn quoting *State v. Faulkner*, 314 Md. 630, 633 (1989)).

"Before evidence of prior bad acts or crimes may be admitted, the trial court must engage in a three-step analysis." *Hurst*, 400 Md. at 408 (citing *Faulkner*, 314 Md. at 634-35). "First, the court must decide whether the evidence falls within an exception to Rule 5-404(b)." *Id.* (citing *Faulkner*, 314 Md. at 634). "Second, the court must decide 'whether the accused's involvement in the other crimes is established by clear and convincing evidence.'" *Id*. (quoting *Faulkner*, 314 Md. at 634). "Finally, the court must balance the necessity for, and the probative value of, the other crimes evidence against any undue prejudice likely to result from its admission." *Id.* (citing *Faulkner*, 314 Md. at 635).

Although it was foreseeable that the question about Ms. Cussen's prior experience with Child Protective Services and the removal of children from her home might lead to testimony about other wrongs that she had allegedly committed, the court did not engage in the requisite three-step analysis. In failing to do so and allowing the testimony about other wrongs, the court erred.

The question becomes whether the error was harmless beyond a reasonable doubt in this bench trial.

In *State v. Babb*, 258 Md. at 551, the Court of Appeals made it clear that when a court erroneously admits propensity evidence in a bench trial, the analysis of harmless error differs markedly from what it would be in a jury trial:

> "The fear of admitting details of convictions for prior crimes stems from its potential influence over a jury. However, this fear is not justified in a non-jury trial where the court, by its wisdom and experience, is expected to be beyond the influence of such evidence."

Id. (quoting *Gunther v. State*, 4 Md. App. 181, 184 (1968)); *accord United States v. Reed*, 744 F.3d 519, 525 (7th Cir. 2014) (observing that a jury is "far less equipped [than a judge] to understand the limitation against the use of propensity evidence").

In *Reed* the trial court had found the defendant guilty of distributing heroin based, in small part, on a similarity between how he was found to have packaged heroin in an earlier criminal case and how the heroin was found to have been packaged in this case. *Id.* at 524; *see id*. at 525 ("the district court judge considered the Rule 404(b) evidence only in the context of the similar packaging of the heroin"). "The court's use of this evidence of similar packaging was," the Seventh Circuit said, "questionable under our current case law." *Id.* But because the trial court had relied on the inadmissible evidence to only a minimal extent, the appellate court concluded that "any error was harmless." *Id.* The court added that it might "have come to a different conclusion" "had the evidence come before a jury." *Id.*

In this case, we have even less of a basis than the Seventh Circuit had in *Reed* to conclude that the inadmissible evidence affected the court's conclusion. The court detailed the bases for its findings of guilt. It said that it based them on the testimony of

Ms. Snedden and Ms. Siljeholm; unlike the trial court in *Reed*, it gave no indication that it based its findings on evidence of other wrongs – *i.e.*, on Ms. Russ's ambiguous reference to Ms. Cussen's prior experience with Child Protective Services. Again, we take the court at its word. *See Nixon*, 140 Md. App. at 191. "[I]f this case had been tried before a jury, our conclusion may well have been different than that presently reached." *Babb*, 258 Md. at 551.

III. SUFFICIENCY OF THE EVIDENCE

Beyond the other problems with the evidence, Ms. Cussen argues that there was not enough of it. Specifically, Ms. Cussen argues that there was insufficient evidence to establish, beyond a reasonable doubt, that she acted outside of the "parental privilege" to employ corporal punishment for the purpose of disciplining a child.

When we are required to determine whether the State adduced sufficient evidence to sustain a criminal conviction, it is not our function or duty to undertake a review of the record that would amount to a retrial of the case. *State v. Albrecht*, 336 Md. 475, 478 (1994). "Rather, we review the evidence in the light most favorable to the State, . . . giving due regard to the trial court's finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Id.* (citations omitted). "[O]ur concern is not with whether the trial court's verdict is in accord with what appears to us to be the weight of the evidence," but "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 offenses charged

beyond a reasonable doubt." *Id.* at 478-79 (citations omitted). In other words, we are not to ask ourselves whether we believe that the evidence at the trial established guilt beyond a reasonable doubt; we are only to ask "'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.'" *Id.* at 479 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

In her challenge to the sufficiency of the evidence, Ms. Cussen relies on the common-law parental privilege, which allows "'the parent of a minor child or one standing *in loco parentis*" to use "a reasonable amount of force upon a child for the purpose of safeguarding or promoting the child's welfare.'" *Fisher v. State*, 367 Md. 218, 271 (2001) (quoting *Bowers v. State*, 283 Md. 115, 126 (1978)). "'So long as the chastisement [is] moderate and reasonable, in light of the age, condition and disposition of the child, and other surrounding circumstances, the parent or custodian [will] not incur criminal liability for assault and battery or a similar offense.'" *Id*. (quoting *Bowers*, 283 Md. at 126). "'On the other hand," if a parent or custodian inflicts corporal punishment "'with a malicious desire to cause pain,'" or if the punishment "'amount[s] to cruel and outrageous treatment of the child, the chastisement [is] deemed unreasonable, thus defeating the parental privilege and subjecting the parent to penal sanctions in those circumstances where criminal liability would have existed absent the parent-child relationship.'" *Id*. (quoting *Bowers*, 283 Md. at 126).

"One way in which the parental privilege can be lost (or, more accurately, [in which it] does not even arise) is where the battery is inflicted on the child with no

purpose of enforcing parental discipline." *Id.* at 274. In other words, for the privilege to apply, the force must "'truly be used in the exercise of domestic authority by way of punishing or disciplining the child – for the betterment of the child or promotion of the child's welfare – and not be a gratuitous attack.'" *Id.* at 275 (quoting *Anderson v. State*, 61 Md. App. 436, 444-45 (1985)). "[T]he very question of whether the force employed is sufficiently moderate to be privileged only has pertinence when the other necessary precondition to the privilege is also present – that the force, moderate or immoderate, is being applied for purposes of chastising or punishing the child." *Anderson*, 61 Md. App. at 445 n.10.

Even when a parent or custodian employs corporal punishment for a proper disciplinary purpose, the privilege will not apply unless the use of force is "moderate and reasonable" under the "totality of the circumstances." *Fisher*, 367 Md. at 272. "[A] reasonable spanking of a child for disciplinary purposes inflicts pain and, in a physical sense, harms or injures the child. But it is not a legally recognized harm or injury." *Id*.

To determine whether parental discipline has crossed the line from moderate and reasonable chastisement to criminal child abuse, courts employ an objective standard. *Fisher*, 367 Md. at 272. Similarly, to determine whether a parent acted maliciously, a court "looks to the objective facts of the intended conduct and not to the subjectively perceived result." *Id.* "Child abuse is a general intent crime, and its mens rea requires only intentionally acting or failing to act under circumstances that objectively meet the statutory definition of abuse." *Id.* at 270.

Despite its name, the "parental privilege" is not in the nature of an affirmative defense against a charge of child abuse; it is a shorthand designation of conduct that falls outside the statutory definition of "child abuse." The statutory definition of physical child "abuse" – "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"[5] – "'appears to be nothing but a codification of the common law principles concerning the limits of permissible parental chastisement.'" *Fisher*, 367 Md. at 271 (quoting *Bowers*, 283 Md. at 127); *see also Anderson*, 61 Md. App. at 447 (there is "a perfect correlation" between "the degree of immoderation necessary to destroy the common law privilege and the degree of immoderation necessary to satisfy the Child Abuse Statute"). It follows that if the State did not discharge its burden[6] of proving that Ms. Cussen's conduct transgressed the boundaries of the parental privilege, the evidence was insufficient to convict her of child abuse.

Notably, the parental privilege is not a defense to the offense of reckless endangerment: because reckless endangerment entails "conduct that creates a substantial risk of death or serious physical injury to another" (Md. Code (2002, 2012 Repl. Vol.), § 3-204(a)(1) of the Criminal Law Article), it necessarily entails the use of force that is not "'moderate and reasonable, in light of the age, condition and disposition of the child,

[5] Md. Code (2002, 2012 Repl. Vol.), § 3-601(a)(2) of the Criminal Law Article.

[6] *See State v. Taylor*, 347 Md. 363, 372-73 (1997).

and other surrounding circumstances.'" *Fisher*, 367 Md. at 271 (quoting *Bowers*, 283 Md. at 126).

Furthermore, even if a parent or custodian uses only a moderate or reasonable amount of force, she may still be guilty of assault and battery if she employs the force for a purpose other than the permissible one of chastising or punishing the child. *Anderson*, 61 Md. App. at 445 n.10. "In the case of such gratuitous and not even arguably justifiable attack, the assailant is guilty of assault and battery whether the force employed is moderate or immoderate." *Id.* "In this context, the parent or custodian stands as a legal stranger in relation to the child and not within any privileged status." *Id.*

With these general principles in mind, we turn to the specific allegations against Ms. Cussen.

1. Slapping and Choking A.

Ms. Siljeholm testified that one night, when 10-year-old A. refused to clean his room and informed his grandmother that he was "not her maid," Ms. Cussen "smacked him across the face and grabbed him by the throat." According to Ms. Siljeholm, Ms. Cussen had "one hand around [A.'s] throat and was like slightly lifting him up." She testified that A.'s "feet [weren't] off the ground but you could see his face turn red and he was having trouble breathing." Ms. Cussen "let go a couple of seconds later and continued to yell." On cross-examination, Ms. Siljeholm acknowledged that she did not notify the police, any medical personnel, or Child Protective Services, because A. "seemed fine afterwards." She did, however, tell Mr. Franey that "if it happened again [she] was gone."

On this evidence, the court found Ms. Cussen guilty of second-degree assault for slapping A. and second-degree assault, second-degree child abuse, and reckless endangerment for choking A. Viewing the evidence in the light most favorable to the State, we conclude that it was sufficient to warrant a conviction on each of those offenses.

We would not hesitate to conclude that a parent had used unreasonable or immoderate force if she held a child's head underwater long enough to make him manifest the objective signs of oxygen deprivation. By analogy, therefore, the circuit court was justified in concluding that Ms. Cussen used unreasonable or immoderate force, in excess of the boundaries of the parental privilege, when she grabbed her grandson by the neck, lifted him part of the way off the ground, and choked him long enough that he turned red and had trouble breathing. The circuit court was also justified in concluding that Ms. Cussen "create[d] a substantial risk of death or serious physical injury" to the child, thus committing the offense of reckless endangerment, by depriving him of oxygen long enough to make him turn red and struggle for breath.

The accompanying slap stands on something of a different footing. Viewed in isolation, the parental privilege would protect a parent or custodian who administered a light slap to the face in response to a refusal to obey a command and a disrespectful retort.[7] The circuit court was, however, justified in concluding that this particular slap

[7] In this regard, we reject the circuit court's conclusion that a single slap to the face was unreasonable and immoderate.

exceeded the bounds of the parental privilege. Ms. Cussen slapped A. just before she lifted him by the neck and throttled him, and she continued to yell at him even after she had released him. In these circumstances, the court could reasonably conclude that Ms. Cussen did not slap A. for a legitimate disciplinary purpose, but because she had lost control of her emotions and was inflicting her wrath on a defenseless child. "In the case of such gratuitous and not even arguably justifiable attack, the assailant is guilty of assault and battery whether the force employed is moderate or immoderate." *See Anderson*, 61 Md. App. at 445 n.10.[8]

In summary, we affirm the convictions for reckless endangerment (Count 8), second-degree child abuse (Count 5), and second-degree assault (Count 6) for choking A. and the conviction for second-degree assault for slapping A. (Count 9).

2. Pulling the Hair of A. and C.

Other than the specific children involved, the evidence produced for the two hair-pulling incidents was identical. Ms. Siljeholm testified about "two incidents where [she] saw [Ms. Cussen] grab [A.]'s hair and put him in the corner and [C.]'s hair and put him in the corner." She testified that, "from what [she could] remember, [the children] were acting bad[ly]." While Ms. Siljeholm "d[id]n't know exactly what caused it," the children were "either yelling at [Ms. Cussen] or talking back or something, and she grabbed them by the hair and put them in the corner." The children "scream[ed] and

[8] At trial, Ms. Cussen did not clearly articulate an argument that the slap and the choke were so closely related as to be components of a single assault.

cr[ied]" in reaction. Ms. Siljeholm did not report seeing any physical injuries, such as places where hair had been pulled out. Ms. Siljeholm did not feel compelled to intervene, call Child Protective Services, or even document the incidents.

On this evidence, the court found Ms. Cussen guilty of two counts of second-degree assault and two counts of second-degree child abuse, one each for each child.[9] We conclude that the evidence was sufficient to support a conviction for assault, but not for child abuse.

Both of the hair-pulling incidents occurred while Ms. Cussen was administering discipline. As with the slapping incident, however, the court was justified in concluding that Ms. Cussen was not acting for the permissible purpose of imposing discipline but with a malicious desire to inflict pain when she grabbed the children (one of whom was only three years old) by the hair — rather than by the arm, the shoulder, or the elbow — and pulled them to the corner where, ironically, she intended to impose a noncorporal form of punishment. Ms. Cussen could have chosen among several ways to lead the children to the corner, but she opted for one that predictably resulted in intense and unnecessary pain. It was reasonable for the court to conclude that the parental privilege does not insulate these kinds of gratuitous or malicious attacks against a charge of assault. *Anderson*, 61 Md. App. at 445 n.10.

[9] The docket erroneously reflects a finding of not guilty one of the counts of second-degree assault, count 20, for pulling C.'s hair.

Nevertheless, the force employed appears not to have caused anything other than temporary pain and appears not to have resulted in the "physical injury" that the child abuse statute requires. *See* CL § 3-601(a)(2). Therefore, we affirm the convictions only for second-degree assault (Counts 4 and 2) and reverse the convictions for second-degree child abuse (Counts 7 and 19). *Anderson*, 61 Md. App. at 445 n.10.

3. The Table-Slamming Incident

Ms. Snedden testified that someone (probably Mr. Franey) had called 13-year-old D. down to the kitchen table to lecture him for his misbehavior. Ms. Cussen was present. After some discussion, Ms. Cussen started "yelling" at D. "for different things that he had done and was trying to lecture him about appropriate behavior." There was "a lot more yelling than anything else." In the midst of the yelling, Ms. Cussen was "slamming things" (Ms. Snedden did not know what) onto the table within about a foot, [or] a foot and a half" of D. D. "appeared nervous and scared, and he was . . . visibly upset."

On the basis of this evidence, the court found Ms. Cussen guilty of second-degree assault. We conclude that the evidence was insufficient to support that conviction.

"Under modern Maryland law, the term 'assault' may connote three different meanings: '(1) A consummated battery or the combination of a consummated battery and its antecedent assault; (2) An attempted battery; and (3) A placing of a victim in reasonable apprehension of an imminent battery.'" David E. Aaronson, *Maryland Criminal Jury Instructions and Commentary*, § 5.10(D), at 641 (2015) (quoting Lamb v. State, 93 Md. App. 422, 428 (1992)).

Because Ms. Cussen neither struck D. nor came within a foot of striking him with whatever she slammed onto the table, the evidence could not support a conviction for the first and second forms of assault – a consummated battery or an attempted battery. Nor do we think that the evidence, even when afforded the full measure of deference that the law requires, would support a finding, beyond a reasonable doubt, that Ms. Cussen placed D. in reasonable apprehension of an imminent battery. Not only did she not come particularly close to striking D. at all, but it is at least as likely that D.'s nervousness and fright were attributable to being called down to be disciplined by three adults, including his uncle and his uncle's girlfriend, as to anything that Ms. Cussen did. For that reason, we reverse the conviction on Count 1.

III. ERRONEOUS DOCKET ENTRIES

We have affirmed the convictions on Counts 6 (second-degree assault of A. in the choking incident), Count 8 (reckless endangerment of A. in the choking incident), and Count 20 (second-degree assault of C. in the hair-pulling incident). The circuit court, however, imposed no sentence on Counts 6, 8, or 20. Furthermore, the docket entries incorrectly state that the court found Ms. Cussen not guilty on those counts.

In *Fabian v. State*, 235 Md. 306, 313 (1964), the trial court had convicted the defendant on three related counts, but imposed a sentence on only one. The Court of Appeals concluded that "the failure to sentence" on two of the counts "was tantamount to a suspension of sentence on those counts." *Id.* In light of *Fabian*, we understand the court to have imposed suspended sentences on Counts 6, 8, or 20.

Ascertaining that the court imposed suspended sentences on Counts 6, 8, and 20 does not address the problem of the not-guilty verdicts that the clerk erroneously entered on those counts. The clerk does not have the authority to acquit a defendant whom a circuit court has convicted, even if the court suspends a sentence. On remand, the clerk of the circuit court should correct the docket entries to reflect that the court found Ms. Cussen guilty on Counts 6, 8, and 20, but imposed suspended sentences.

CONCLUSION

We affirm the guilty verdicts on Counts 4, 5, 6, 8, 9, and 20. We reverse the guilty verdicts on Counts 1, 7, and 19. We direct that the Clerk of the Circuit Court for Talbot County correct the docket entries to reflect guilty verdicts on Counts 6, 8, and 20.

JUDGMENTS OF THE CIRCUIT COURT FOR TALBOT COUNTY AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED WITH INSTRUCTIONS TO ENTER GUILTY VERDICTS ON COUNTS 6, 8, AND 20 AND FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION; COSTS TO BE EVENLY DIVIDED BETWEEN APPELLANT AND TALBOT COUNTY.