UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 730

September Term, 2015

DAREN MITCHELL CLOWER

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Wright,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 8, 2016

In 2012, in the Circuit Court for Calvert County, Daren Mitchell Clower, the appellant, was convicted on a not guilty agreed statement of facts of sexual abuse of a minor, in violation of Md. Code (2002), section 3-602 of the Criminal Law Article ("CL"), and contributing to rendering a child a child in need of assistance ("CINA"), in violation of Md. Code (1973, 2006 Repl. Vol.), section 3-828 of the Courts & Judicial Proceedings Article ("CJP"). In a post-conviction case, he was granted leave to note a belated appeal to this Court.

The appellant raises two issues for review, which we have rephrased:

I. Did the circuit court err in accepting the not guilty agreed statement of facts?

II. Was the evidence legally sufficient to sustain the convictions?

For the following reasons, we shall affirm the judgments of the circuit court.

FACTS AND PROCEEDINGS

On February 13, 2012, the circuit court held a plea hearing in which the appellant entered an *Alford* plea in an unrelated case for second-degree assault and proceeded on a not guilty agreed statement of facts in this case.[1] The State submitted to the court a typed document as the agreed statement of facts. Due to the nature of the offenses, and without objection by the appellant, the presiding judge read the agreed statement of facts to himself; it was not read aloud into the record. The statement of facts reads as follows:

> On June 3, 2011, Daren M[.], the older brother of the victim [K.M.], responded to the Maryland State Police barracks to report a possible child

[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970).

abuse that his Dad had committed against his brother. [Daren] then met with Det. Naughton and Det. Winston and provided a written statement.

In that Statement [Daren] state[d] that he had come to Maryland to visit his 15[-]year[-]old brother [K.M.] That upon speaking to [K.M.] he could tell he was depressed and that he had 4 fresh cuts on his arm from cutting himself. Darren [sic] asked [K.M.] what was going on. [K.M.] told him that on Sunday[,] May 29, 2011[,] he and his Dad, who would be identified as the defendant, [. . .] had sex with a girl. [K.M.] further stated that he had gotten drunk at his Dad's house and they had gotten into a fight. [K.M.] further stated that after the fight he had a panic attack and cut his arm out of frustration.

After interviewing [the defendant], Det. Winston attempted to located [sic] [K.M.] [A]t approximately 1130, he contacted Det. Libby at the school and learned that although [K.M.] had come into school he was now missing from school and his mother, Tina Attic who has custody, did not know where he was, nor had he been signed out of school by anyone else. Mrs. Attic contacted the defendant to see if he had heard from [K.M.] and he indicated that he had not. Det. Libby of the CCSD went to [K.M.'s] home and the home of several of [K.M.'s] friends and he could not be located. Due to his depression and cutting behavior, [K.M.] was entered into the Missing Persons System at around 300 pm[.] Det. Winston was contacted by Trp Saucerman who had gotten a hold of the defendant who advised that [K.M.] was with him and had been with him most of the day on a job site. Trp Saucerman picked [K.M.] up and transported him to his mother. At that time Det. Winston also arrived and with Mrs. Attic's permission interviewed [K.M.] in his vehicle. This interview was recorded.

During this interview [K.M.] stated that he had cut himself out of frustration after an argument with his Dad. [K.M.] also stated that he drinks almost every time he is at his Dad's and that he had tequila while he was there the past weekend of 5/27-5/29.

Det. Winston then asked [K.M.] to tell him what happened over the weekend. [K.M.] stated that he was at his Dad's (the defendant's house) partying with a bunch of older people and that he got laid. [K.M.] stated that the older people included his Dad, a tenant named Donny, a female named Tammy and another man named Robert. [K.M.] also stated that he lost his virginity to Tammy that day. [K.M.] stated that on Sunday[,] May 29, 2011[,] "My Dad's tenant friend Robert invited Tammy over and they all got really drunk. Then I got really drunk and we partied a little. Tammy was out on the porch

grinding on everybody and I guess she liked my dick better. Then she grabbed my arm and took me inside and we started f---ing in the dining room . . . we f–ed for about 30 minutes and then took a smoke break." [K.M.] stated that his Dad knew what he was doing with Tammy and that after the first time he had sex with Tammy his Dad said "not bad for a 15[-]year[-]old huh[.]" [K.M.] further stated that he and Tammy went back inside and "that's where my Dad jumps in and gets his dick sucked" – he indicated that his Dad also told him that Tammy had STDs because he was jealous that she didn't want to have sex with him. He also said his Dad later retracted the statement about Tammy having an STD[.]

Det. Winston then went to the defendant's home and interviewed the defendant in his vehicle and that statement was also recorded. The defendant was asked about the cuts on [K.M.'s] arm[.] [H]e stated that [K.M.] had cut his arm at his house with a butter knife because of a fight they had gotten into, and that he treated it with Neosporin. He was asked about allowing [K.M.] to drink and he stated that he doesn't allow it, "not one drop." He was asked if he allowed [K.M.] to drink on Sunday 5/29 and he said no. Det. Winston then asked the defendant what happened at his house on Sunday and he said[,] "Here it is Friday man. It ain[']t happening. I'm not stating anything on the record. No sir. That's six or five days ago. I could say something that would get me in trouble. Straight up, I'm not gonna do it. It's not right. It's not illegal." Det. Winston again asked about what happened on Sunday and the defendant stated[,] "I really don't want to tell you anything because I don't remember. I've had a TBI [traumatic brain injury] closed and I take medication . . ."

Det. Winston then interviewed Tammy Nalborczyk ["Tammy"] which was also audio recorded. She was asked about what happened on Sunday and she stated that she met Robert at a friend's house (identified as the defendant's home in Lusby, Calvert County Maryland) and that everyone went out on the back porch and they were playing music, drinking and dancing. She indicated that they were drinking beer and tequila and that [K.M.] had in fact drunk beer and tequila and that the defendant was present. Tammy also indicated that she had danced will [sic] all the guys on the porch. When asked about what she did with [K.M.] she stated[,] "[T]hat night, [K.M.] and I had sex and his father knew about it and consented with it[.]" She indicated that they had a conversation about having sex on the back porch with everyone present. She also stated that the first time they had sex in the dining room the defendant came into the room and watched for a short period of time stating "give it to her." Tammy stated that the 2nd time she and [K.M.] had sex that night the defendant again came into the room this

> time he un-buttoned his pants pulled out his penis and asked Tammy to perform oral on him. Tammy stated that this lasted for 10 minutes, while [K.M.] had sex with her from behind.
>
> Both [K.M.] and Tammy were able to give matching descriptions of the defendant's penis.
>
> All events occurred in Calvert County Maryland[.]

The document also included a paragraph entitled "AGREEMENT," stating:

> [The defendant] will be entering a NOT GUILTY AGREED STATEMENT OF FACTS in case K-11-203 and an *Alford* plea to second[-]degree assault in K-11-360. The [S]tate will ask for a total active sentence of 10-15 years in the division of corrections. The defense is free to allocute.
>
> If the court finds the defendant guilty of any sexual offenses to include conspiracy it will require registration.

The document included citations to cases regarding sexual molestation or exploitation, and summaries of their holdings; a list of the elements of Child Sex Abuse; a description of accomplice liability; and the Maryland Pattern Criminal Jury Instruction ("MPJI-CR") 4:29.8 for third degree sex offense.

After the judge finished reading the document to himself, the following colloquy occurred:

> THE COURT: Okay, what I have done is I have read the agreed statement of facts. Now, there is also in this document that was handed to me argument, and I don't know whether the –
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> [STATE'S ATTORNEY]: Well, it's case law, Your Honor.
>
> THE COURT: I understand, but it's argument, and I don't know whether [defense counsel] has any arguments he wants to present in opposition to any of this.
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> [DEFENSE COUNSEL]: Yes, Your Honor. I'm going to start with the most serious offense first and then move on. The most serious offense is the child

abuse, the first count of the indictment, and that requires any act that involves sexual molestation or exploitation of a child, and incest, rape, or sexual offense, sodomy, and unnatural or perverted sexual practices. And the case that is cited by the State goes into a situation where, at least in that case, there was an allegation by the defendant that there was no direct sexual contact between her and the victim in the case. She was – and that – that case is *Degren* [*v. State*, 352 Md. 400 (1999)]. However, in the *Degren* case the facts were very different. The defendant in that case was involved in the sex act from the very beginning of the sex act, essentially consented at the beginning, gave direct consent, was in the same room.

And – so – and this is a lengthy opinion. This is – the *Degren* opinion is a lengthy opinion. And so what that tells me is the – is the court was taking a careful look at that statute and dealing with all the questions that are – that are presented by the statute like this. Because, frankly, when you have language like, you know, a catch-all phrase like unnatural or perverted sexual practices, well, maybe to some people that's showing your kid a Playboy magazine, but I don't think that you should be convicted of a statute or a crime this serious for doing something like that, I'm not sure that it's a crime at all. And so whenever you have a statute like this, it's a bit troubling because the court has to draw a line. And I think the court in the *Degren* case drew a line. I think Mr. Clower's conduct, while troubling in this case, fell outside that line.

And I think the statement of facts has to be carefully read. When you look at the statement of facts, they are put in a certain order. And we permitted this statement of facts, but one thing that's clear from the statement of facts is there is no chronology, this occurred before that, other than – and there was a statement by the victim that Mr. – I'm sorry, by the – by – we will call her Tammy, the woman involved in this case. And we will call her Tammy because I have a great deal of difficulty pronouncing her last name. There was a statement by her that his father knew about it and consented with it, but when that – when she was able to determine that, how she was able to determine that is not clear from the statement of facts.

She also gave a statement that, and I'm looking for the exact words, that my client walked in and said something while the act was going on between the two of them that to encourage the act, but the victim gave a detailed statement, and nowhere did he say that was occurring during the act. He said that there were some comments later after an act occurred, but he didn't say that anything occurred during the act. And so at that – what we have then is my client walking in during the act, participating, but at that point the act had already started. It had already begun. It's not clear to me what additional damage could have been done by that or – but more clearly, whether that is child abuse if it doesn't – the abuse doesn't start with some

sort of involvement from the very beginning like what happened in the *Degren* case.

So I believe with this statute, you know, the statute could have been written more clearly, and maybe it needs to be, but this clearly falls outside the line that was drawn in *Degren*. And I believe just from a constitutional perspective and a vagueness perspective it's very troubling to now give the court the pen and say draw the line because we are not really sure what this statute says.

* * *

Now, with regard to the conspiracy charge and in terms of the abuse charge, there is no evidence in this case of any sort of agreement or compact between Tammy and my client. This – this – this is something that just happened. And there is no evidence for conspiracy. I would mention that if the court were to convict my client of the child abuse, then I believe that merges into that count. There is also another count of sexual abuse, but there is no evidence of a prior compact. Again, the statement of facts has to be carefully read, because there is nowhere is it alleged that this happened before that. And the only allegation is this very vague statement by Tammy that my client knew about it and consented. Well, did he know about it afterwards and say it was okay? What does that mean? When did he know? When did he consent? I think the State bears the burden of proof on those issues in the not guilty agreed statement of facts, and the State hasn't made the proper allegations.

And I think the – I think the case to look at, and it deals with a different charge, but *Mitchell* [*v.*] *State*, 363 [Md.] 130 [(2001)], that deals with a second degree murder charge, or murder conviction, and a conspiracy – a conviction of conspiracy to commit second degree murder. And what the court held in that case is you can't have conspiracy to commit second degree murder because that's a spontaneous event. And this was a spontaneous event, and there is certainly no evidence otherwise.

With respect to the CINA charge, there is – the evidence that's lacking here is tying the misdeeds of my client to the child's need for assistance. I mean first of all, the *Hernandez* case – I'm sorry, *Rivera* [*v. State*, 409 Md. 176 (2009)] case, that involved interaction by Social Services. This case went directly to the police. And – but more importantly, what we have in this case is a statement that the police got involved when the victim tried to cut his wrist with a butter knife after he and his father got into an argument. Well, there is – there is nothing in the statement of facts that tells why they got into an argument. More importantly, there is no testimony from

anybody, a psychologist or somebody at Social Services, as to how this act may have created a situation that put the child in need of assistance.

So, Your Honor, for the reasons that we have stated, we don't believe that the facts are sufficient to convict my client under any of the counts of the indictment.

THE COURT: Okay. Thank you.

[State's Attorney?]

[STATE'S ATTORNEY]: Thank you, Your Honor. . . . The first point we would like to make, along with our previously submitted arguments, is the victim in this case is 15 years old. He does not have a legal capacity to consent to sexual intercourse with someone over the age of 21, which Tammy Nalborczyk was. And we are not talking showing the defendant – the victim a Playboy magazine here. What we are talking about is the father allowing his 15[-]year[-]old son to drink [t]equila in his home and have sexual intercourse with a woman over the age of 21. Counsel asked when did he know and when did he consent? I would say most likely when he walked into the dining room and saw his 15[-]year[-]old having sex with a woman over the age of 21, and his comment was, "Give it to her." I would say not only is that consent, that is encouraging. Then I would also say that he consented and he knew when he walked in on his 15[-]year[-]old son and this well over 21[-]year[-]old woman having sexual intercourse in a bedroom, and he decides to drop his pants and get oral sex from the woman while his son has sexual intercourse with the woman from behind. I don't think I have ever seen anything more in a concertive action.

More often – more importantly, Your Honor, we are talking about exploitation here. We are not saying he sexually abused the child. We are saying he sexually exploited the child, which indeed I believe the facts bear out. How do we know this child is harmed? The child is cutting himself. This is a child that clearly is crying out and needs help, and it's a direct result of the defendant's behavior.

Thank you.

THE COURT: Anything you want to say in response?

[DEFENSE COUNSEL]: Well, I think I addressed, Your Honor, the statement by Tammy that he came in and said "give it to her" was not corroborated by the victim at all, and the victim gave a detailed statement. What he said was that his father at some point said – said – acknowledged knowing about the act, but – but he didn't – that statement he – that's not corroborated.

> But even so, at that point the sex had already started to happen. So how much worse was it going to get in terms of – you know, there is really no evidence that my client set that scene up. I mean the testimony of both the victim and Tammy was that they met at this party, that everybody was dancing with Tammy. People weren't standing around saying, okay, let's get these two together. This is something that just happened, and my client wasn't at the switch engineering it. And I think in *Degren* the defendant's involvement from the very beginning in that case is what was crucial to the court's decision.
>
> So – and what I would say in terms of exploitation, the statute exploitation to me involves involvement, concert, planning the event. And while the State has thrown some, you know, everything that it can into the statement of facts that it believes supports that, there really is no evidence that this is something, you know, clearly regrettable, but it happened, and it happened spontaneously, and that's what the evidence shows. And if it happened in that manner, Your Honor, I don't believe the sexual abuse statute – the sexual exploitation language or the sexual abuse when all we have to guide us is unnatural or perverted sexual practice, again, I think from a constitutional perspective that's too vague. The court can't write legislation for the legislature.

At a subsequent proceeding on March 2, 2012, the court determined that the not guilty agreed statement of facts was sufficient to convict the appellant of all charges.

On May 15, 2012, the court sentenced the appellant to a prison term of twelve years, with all but seven suspended, for child sexual abuse, and one year, concurrent, for contributing to rendering a child a CINA.[2] As to the appellant's conviction in the unrelated case for second-degree assault, the court sentenced the appellant to a sentence of one year and one day, to run consecutively with his convictions in this case. Upon release,

[2] The appellant also was charged and convicted of conspiracy to commit child sexual abuse and conspiracy to commit third-degree sexual offense. The sentencing court merged these convictions into the child sexual abuse conviction for sentencing purposes. The appellant had been charged with furnishing alcohol to a minor, but the State *nol prossed* that charge.

the appellant is subject to a five-year period of probation and is required to register as a sex offender.

DISCUSSION

I.

The appellant contends the court erred by accepting the not guilty agreed statement of facts. He offers two reasons. First, in actuality, the statement was not an agreed statement of facts; rather, it was a summary of the testimony the State would elicit should the matter proceed to trial and a blanket denial by the appellant of any criminal wrongdoing. Second, Rule 4-243(d) mandates that the judge actually read the plea agreement into the record, instead of reading the document to himself at the bench.

The State counters that the statement of facts properly was accepted by the court as an agreed statement of facts because it set forth the evidence the State would present and it set forth the appellant's statement, which did not contradict any of the material facts. The State points out that the appellant agreed to the judge's reading the statement of facts to himself and that the rule the appellant cites does not apply.

A.

A not guilty agreed statement of facts is a "hybrid plea, whereby the accused pleads not guilty, forgoes a full trial and proceeds on an agreed statement of facts or stipulated evidence[.]" *Bishop v. State*, 417 Md. 1, 16 (2010). Proceeding by way of stipulated evidence is not the same as proceeding by a not guilty agreed statement of facts, however. As the Court of Appeals has explained:

> "There is a distinction between an agreed statement of facts and evidence offered by way of stipulation. Under an agreed statement of facts both [the] State and the defense agree as to the ultimate facts. Then the facts are not in dispute, and there can be, by definition, no factual conflict. The trier of fact is not called upon to determine the facts as the agreement is to the truth of the ultimate facts themselves. There is no fact-finding function left to perform. To render judgment, the court simply applies the law to the facts agreed upon. . . .
>
> On the other hand, when evidence is offered by way of stipulation, there is no agreement as to the facts which the evidence seeks to establish. Such a stipulation only goes to the content of the testimony of a particular witness if he were to appear and testify. The agreement is to what the evidence will be, not to what the facts are. Thus, the evidence adduced by such a stipulation may well be in conflict with other evidence received. For the trier of fact to determine the ultimate facts on such conflicting evidence, there must be some basis on which to judge the credibility of the witness whose testimony is the subject of the stipulation, or to ascertain the reliability of that testimony, to the end that the evidence obtained by stipulation may be weighed against other relevant evidence adduced. . . ."

Taylor v. State, 388 Md. 385, 396–97 (2005) (alteration in original) (emphasis omitted) (quoting *Barnes v. State*, 31 Md. App. 25, 35 (1976)).

Bishop illustrates the difference between the two procedural vehicles. Bishop was charged with two counts of sexual abuse of a minor. He elected to proceed by way of a not guilty agreed statement of facts. The statement of facts consisted of Bishop's statement to the police and the State's proffer of the substance of the victims' testimony and the substance of a series of telephone calls between Bishop and one of the victims, in which Bishop purportedly acknowledged abusing the victims. Through counsel, Bishop agreed that the victims would testify as proffered by the State. Bishop's lawyer argued, however, that Bishop had not acknowledged guilt in the telephone calls. Based on the agreed statement of facts, the court convicted Bishop of both counts of sexual abuse.

The case reached the Court of Appeals, which vacated the convictions. The Court rejected the State's position that Bishop had proceeded by way of a not guilty agreed statement of facts, observing that "[t]he State's proffer . . . was more illustrative of what the testimony and evidence was going to be had the case gone to a full trial rather than an agreement as to the ultimate facts[.]" *Id.* at 26–27. The Court concluded that "it is clear that the parties had no agreement as to the ultimate facts of the case and, at best, were stipulating to the evidence that the State would have presented at trial." *Id.* at 27. The Court explained, "Bishop's counsel's remarks created a dispute over the content of the telephone conversations, one which the State left unresolved, making Bishop's hybrid plea . . . the incorrect vehicle for the Circuit Court judge to determine Bishop's guilt." *Id.* at 29–30. Stated another way, "the implication of a plea in which a defendant agrees to the ultimate facts of the case is palpable, compared to a plea in which the defendant merely stipulates to the State's evidence, making no admission to the facts that the State's evidence purports to establish." *Id.* at 25. "In one, the accused is essentially making a judicial concession as to the ultimate facts of the case, and in the other, the accused is not admitting to anything except that the State would present the enumerated evidence." *Id.* *See also* *Taylor*, 388 Md. at 398–99; *Barnes*, 31 Md. App. at 36.

We return to the case at bar. The appellant takes the position that there was no agreed statement of facts but only a stipulation as to what the witnesses would testify to. And, most significantly, he maintains that the stipulation included a blanket denial by him of the allegations against him. Therefore, the parties did not agree on a set of facts on

which the court could apply the law and render a verdict. Rather, they offered the court conflicting versions of events that necessitated factual findings based on credibility assessments.

The statement of facts does not support this argument. It recites what was said to the police by K.M., Tammy, and the appellant when the police interviewed them. The only denial by the appellant was that he permitted K.M. to drink alcohol. Otherwise, when asked about the events at the party on May 29, 2011, he said "[i]t's not illegal" and then he said he could not remember what had happened. So, there was no denial by the appellant of the facts elicited from K.M. and Tammy in their interviews, except as it pertained to K.M.'s drinking alcohol, which was not a material issue.

Accordingly, there was no conflict in the material facts submitted to the court in the agreed statement of facts. The statement was a not guilty agreed statement of facts, not a stipulation of facts. Also, in the colloquy following the court's reading of the statement of facts, the appellant did not argue that there was any dispute of material fact. Rather, he argued that the facts were not legally sufficient to support convictions on the charges against him and that Tammy's statement that he had consented to her having sexual intercourse with K.M. was not corroborated. These were legal arguments. At no point did the appellant contest the ultimate facts of the case—that he knew that Tammy was having sex with K.M., who was only 15 years old, and did not intercede; indeed, he joined in. The court did not err in accepting the statement as a not guilty agreed statement of facts.

B.

There is no merit in the appellant's argument that the court erred by failing to read the agreed statement of facts into the record. The judge asked defense counsel if he had any objection to the court's reading the document to himself, to which counsel responded, "No objection." Any argument as to this course of action is, therefore, waived. *See* Rule 8-131(a).

Moreover, Rule 4-243 applies to guilty pleas and pleas of *nolo contendere*. Ordinarily, a not guilty agreed statement of facts is not the functional equivalent of a guilty plea, *see Ingersoll v. State*, 65 Md. App. 753, 761 (1986), and there was nothing here that deviated from that general rule. Rule 4-243 did not apply to the not guilty agreed statement of facts in this case.[3]

II.

The appellant contends that if the not guilty agreed statement of facts was properly accepted, the facts in the statement were not legally sufficient to support his convictions.

[3] In one sentence in his brief, the appellant states that his due process rights were violated because of these two failures by the court (which we have rejected) and because the court did not give him the opportunity to offer any additions or corrections to the statement of facts before the court rendered its verdict. In *Ingersoll v. State*, this Court stated that the "proper procedure to be followed when a plea of not guilty is entered and the case proceeds on an agreed statement of facts" is that, "[f]ollowing the recitation of the statement of facts, and after allowing for any additions or corrections to be made by the defense, the trial judge determines the legal sufficiency of the evidence to convict." 65 Md. App. 753, 763–64 (1986).

The proper procedure was followed here. After the judge read the statement of facts, a lengthy colloquy took place among the court and counsel. Defense counsel had ample opportunity to make additions or corrections to the agreed statement of facts.

In reviewing the sufficiency of the evidence, "[w]e must determine, 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Handy v. State*, 175 Md. App. 538, 561 (2007) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Stated another way, we determine "'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt.'" *Neal v. State*, 191 Md. App. 297, 314 (2010) (quoting *White v. State*, 363 Md. 150, 162 (2001)).

A.

CL section 3-602(b)(1) provides, in relevant part: "A parent . . . may not cause sexual abuse to [his] minor [child]." "Sexual abuse" is "an act that involves sexual molestation ***or exploitation*** of a minor, whether physical injuries are sustained or not[,]" including, "***sexual offense in any degree***." CL § 3-602(a)(4)(ii) (emphasis added). "[I]t is not necessary that the defendant physically touch the child in order to commit the crime [of child sexual abuse]. The context in which the abuse occurs matters and ***failing to act to prevent abuse can be criminal***." *Walker v. State*, 432 Md. 587, 622 (2013) (emphasis added). Additionally, "exploitation requires that the defendant 'took advantage of or unjustly or improperly used the child for his or her own benefit.'" *Id.* (emphasis omitted) (quoting *Degren*, 352 Md. at 426). Furthermore, courts are to construe CL section 3-602 broadly. *See id.* at 622–23.

In *Degren*, the defendant watched while a minor girl who was under her supervision engaged in various sex acts with a number of men. She was convicted of multiple counts of child sexual abuse under the predecessor statute to CL section 3-602. The case came before the Court of Appeals. The defendant argued that she could not be found guilty of child sexual abuse for failing to prevent another person's sexual abuse of a minor. The Court rejected this argument. It reasoned that the General Assembly had criminalized the failure of an adult having responsibility for a minor to intercede to stop the physical abuse of the minor, and it would defy "common sense, logic, and the purpose and goals of the child abuse statute" not to similarly punish a supervising adult who fails to intercede to stop the sexual abuse of a child. 352 Md. at 420. The Court concluded that the 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." *Id.* at 425.

The appellant attempts to distinguish *Degren* on the ground that, in that case, the defendant was present from the inception of the sexual acts perpetrated against the minor, and here, the appellant merely encountered his son after the sexual act by Tammy was already in progress.

We fail to see any merit in this distinction. It does not matter whether the appellant was present when Tammy started to have sex with K.M., or whether he encountered her in the middle of having sex with K.M. What matters is that when he saw what was happening, he failed to intervene and stop Tammy from engaging in sexual intercourse

with K.M. Indeed, rather than intervene, the appellant participated in the act, receiving oral sex from Tammy. He did more than simply fail to act; he actively participated. His conduct is not distinguishable from that in *Degren*. The evidence was sufficient to support the conviction of child sexual abuse.

B.

CJP section 3-828(a) provides: "An adult may not willfully contribute to, encourage, cause or tend to cause any act, omission, or condition that renders a child in need of assistance." Notably, "[a] person may be convicted [of CJP section 3-828] even if the child is not adjudicated a CINA." CJP § 3-828(b). "[CINA] means a child who requires court intervention because: (1) [t]he child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) [t]he child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs." CJP § 3-801(f).

The appellant contends there was insufficient evidence to convict him of violating CJP section 3-828 because there was no expert testimony or other evidence to show that his acts caused harm to K.M. He argues that there was no evidence to connect K.M.'s self-harm to his (the appellant's) behavior.

This case is similar to *Rivera*, *supra*. Rivera pled guilty to one count of violating CJP section 3-828 after he had engaged in anal sex and other inappropriate touching of his minor daughter. The Court of Appeals determined that this conduct was sufficient to support a conviction under CJP section 3-828. We reach the same conclusion here. The

appellant's participation in and failure to stop sex acts involving his minor son and an adult female is sufficient to support his conviction for rendering a child a CINA.

JUDGMENTS OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED. COSTS TO BE PAID BY THE APPELLANT.