Circuit Court for Montgomery County
Case No. 137947C

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 304

September Term, 2024

KIMBERLY LYNETTE TYLER

v.

STATE OF MARYLAND

Berger,
Arthur,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Arthur, J.

Filed: December 8, 2025

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

Kimberly Tyler's eight-year-old son suffered third-degree burns over almost 30 percent of his body. Although Tyler claimed that the child was burned when she accidentally spilled hot oil on him, her younger sister testified that Tyler admitted to pouring rubbing alcohol on him and setting it on fire in an attempt to discipline him. The child received no professional medical attention for several weeks after he suffered the burns.

A Montgomery County jury convicted Tyler of first-degree child abuse, second-degree child abuse, conspiracy to neglect a minor, and neglect of a minor. On the charge of first-degree child abuse, the trial court sentenced Tyler to 25 years' imprisonment. On the charge of conspiracy to neglect a minor, the court sentenced Tyler to a consecutive five-year sentence, all suspended. For purposes of sentencing, Tyler's convictions for second-degree child abuse and for neglect of a minor merged with her conviction for first-degree child abuse.

Tyler appealed.

QUESTIONS PRESENTED

Tyler presents the following two questions, which we quote:

1. Was the evidence legally insufficient to support [Tyler's] convictions?

2. Did the trial court err in permitting the State to argue in closing that child abuse could be proven by the affirmative act of burning *or* by the failure to seek medical intervention afterwards, and then in instructing the jury likewise in response to a note sent during deliberations?

We conclude that there was ample evidence to sustain Tyler's convictions. We further conclude that the trial court did not err or abuse its discretion in overruling Tyler's

objection to the prosecutor's statement during closing argument or in its response to the jury's note.

BACKGROUND

I. The Evidence

We shall discuss the pertinent evidence at trial in the order in which the parties presented it to the jury.

A. The Medical Records

On May 30, 2020, Tyler's father ("Grandfather") brought T., Tyler's eight-year-old son, to Children's National Hospital in Washington, D.C. T. had third-degree burns on his "face, neck, torso and arms . . . [in] various stages of healing." The burns covered approximately 20 to 29 percent of his body. On his admission to the hospital, T. was "[c]rying" and "agitated." He was treated with morphine for his pain.

B. Dr. Randall Burd's Testimony

Dr. Randall Burd, an expert in pediatric trauma, burn surgery, and general pediatric surgery, directed T.'s care at the hospital and performed most of the surgeries that were required to treat T.'s burns.

Dr. Burd testified that T. suffered from extensive "deep burns" on his torso, chest, upper extremities, back, and neck. The wounds were "obviously infected." "There was literally pus dripping off of . . . the burn wounds." T.'s skin had burned "down to the level of fat," and the fat was "exposed." Some of the areas around the edges of the burns appeared to have begun to heal. Dr. Burd's impression, based on his experience with hundreds of burn injuries in his career, was that T.'s burns "had been there for a while"—

for "at least" several "days, and potentially a few weeks." The State introduced photographs of T.'s burns.

T. was hospitalized for two months. He underwent more than 20 surgeries during his hospitalization. The surgeries involved cleaning the burned areas and grafting healthy skin to the areas where he had suffered a permanent loss of skin.

Dr. Burd testified that T. suffered from "contractures" on his neck and upper extremities—areas "where the scar gets so thick and shrunken up that it limits mobility of one or more joints," in T.'s case, his arms. The contractures required laser surgeries. Dr. Burd operated on T. as often as twice per week, allowing T. to recover briefly from the significant blood loss involved in the surgeries. "He will always have these scars," said Dr. Burd.

Anticipating Tyler's defense, the State asked Dr. Burd whether T. appeared to have been scalded by a hot liquid. Dr. Burd responded that T.'s burn injuries did "not look like a typical spill scald injury," because his burns had "near complete coverage" of the front and side of his neck. Spilled hot liquid, he testified, typically results in an injury to only one side of the neck. Dr. Burd explained that spilled liquid "quickly cools off" and "runs off" the skin, while burns caused by flames tend to result in deeper injuries because the clothing forces the heat to "stick[] to the skin."

On cross-examination, defense counsel asked whether T.'s injuries were "consistent with" what would happen if "a pot of very hot oil" were spilled on him. Dr. Burd responded, "Yes and no." Dr. Burd could believe that the burns on the child's chest had been caused by spilled oil. Dr. Burd testified, however, that "the extent and depth"

of the injuries to T.'s neck "doesn't go along" with the "story" that T. had been burned by hot oil. Dr. Burd also testified that a burn from spilled oil or grease "most commonly looks like a splatter," which was apparently not the case with T.'s burns.

C. K.'s Testimony

Tyler's sister, K., who was 15 years old in May 2020, testified that she lived with her parents but often stayed with Tyler. K. testified that Tyler lived in a two-bedroom apartment with her three children; her wife, C.; and C.'s three children.

On a Friday in May, after Mother's Day but before Memorial Day, K. was staying at Tyler's apartment and sleeping in the living room. K. awoke to a "commotion" in the kitchen. The children were eating breakfast, and Tyler and C. were speaking to T. in raised voices. After the other children went to their bedroom, T. remained at the kitchen table with Tyler and C. K. could see C. at the table but could not see Tyler or T.

K. heard C. say, "Kimmy, his eye." K. saw Tyler and T. run to the children's bathroom and Tyler put him in the shower. T. "was in flames" from his midsection "upwards on his body" and was screaming. K. smelled smoke. A few minutes later K. saw T.'s burned tank top on the bathroom floor.

Tyler, who did not have a phone, asked to use K.'s phone. When the call was over, K. took her phone and left the apartment, feeling "[o]verwhelmed." K. ran into her parents as they were arriving at Tyler's apartment, apparently in response to Tyler's call. Her parents took her back to Tyler's apartment.

When K. and her parents arrived at the apartment, T. was lying on the bed in the master bedroom. He was "charred" and was moaning in pain. There was no discussion

of calling 911, and no one called a doctor. One of K.'s parents drove Tyler and K. to a store to get something to treat T.'s injuries.

After a few hours, K. left Tyler's apartment and went home with her parents. After receiving a telephone call later that day, Grandfather returned to the apartment and brought T. to his apartment in Howard County. When T. arrived at Grandfather's apartment, K. could hear T. groaning.

In the days that followed, T. seemed weak and could not stand on his own. He would cry and scream, and he appeared to be in pain. He was bandaged, but K. could see discoloration through the bandages. K. did not observe her parents talking to Tyler on the telephone during that time.

After a few days, K. returned to Tyler's apartment because she did not want to be at her parents' house. "It was just too much," she testified.

K. testified that she tried to talk to Tyler about what had happened to T. Tyler told her to "stay out of her business."

At some point, K. said that she reproached Tyler. According to K., Tyler responded "that everybody[] [was] always worried about [T.]," but "[n]obody really gave an F about her."

While K. was back at Tyler's apartment, she never saw Tyler talking to their parents or to T. During that time, Tyler went to visit T. only once. According to K., Tyler "didn't seem very sad" about what happened to T. K. never heard Tyler talk about getting medical attention for T.

K. testified that, when her parents suggested that T. should go to a hospital, Tyler responded that he was "fine." K. also told Tyler that T. needed to go to a hospital. Tyler told her too that T. was "fine."

Meanwhile, Tyler and C. would have friends come over to party in the apartment**.** Tyler would explain T.'s absence by telling the guests that he was at her parents' house. She did not tell them about T.'s injuries.

After a few days, K. returned to her parents' apartment. When she returned, T. was still bandaged, was still in pain, and was still screaming and crying. K. could see the discoloration beneath T.'s bandages. T. could not walk—"people would carry him."

At some point, K.'s parents took T. back to Tyler's apartment. T. did not want to go back to his mother.

Shortly after T. returned to Tyler's apartment, Tyler began to call their parents. K. learned that, in response to the calls, her parents took T. to a hospital.

K. testified that Tyler told her how T. was burned. According to K., Tyler said that she had "put alcohol on [T.'s] hand, and then used the lighter to ignite fire, but it wasn't supposed to be as big as it was." "She said that she just wanted to just simply light his hand on fire, not to harm him, but to scare him." Tyler kept rubbing alcohol in the kitchen of her apartment.

About a week after her parents took T. to the hospital, Tyler called K. Tyler was frustrated and angry and was raising her voice. She was upset about "the questioning process" and was concerned that "they were going to take her kids away[.]" Tyler told K. that she "needed to tell the truth" about what had happened to T., which, Tyler said, was

that "[t]hat grease had spilled on him" while "she was frying chicken." K. testified that she did not see Tyler frying chicken on the stove at any time in May 2020. Instead, Tyler would use an air fryer to fry chicken.

K. also testified that, at some point, Tyler said that she was worried about going to jail.

D. Grandfather's Testimony

At the time of Tyler's trial, Grandfather had pleaded guilty to criminal charges concerning his failure to obtain professional medical care for T. On the State's motion, the court compelled Grandfather to testify despite his invocation of his Fifth Amendment privilege against self-incrimination.

Grandfather testified that in May 2020 he received a phone call from Tyler and C., informing him that "something [had] happened" and that they needed to come to Tyler's apartment. When Grandfather arrived at the apartment, T. was lying in bed. He had bruises on his arms and face and had burn marks on his body.

Upon seeing T., Grandfather said to Tyler, "you can't hide this." Tyler did not respond. Grandfather did not ask Tyler what had happened to T. "because . . . [he] didn't want to know."

Grandfather was familiar with burns because he had been burned at age 12 when hot tea spilled in his lap, and he had gone to the hospital for treatment. Grandfather and Tyler went to the drug store to get bandages, Neosporin, and burn cream, and they returned to Tyler's apartment to bandage T. After bandaging T., Grandfather returned to his home in Howard County.

Later that day, Grandfather's wife received a phone call about T., which prompted him to return to Tyler's apartment and bring T. back to his home. Tyler and C. had to help T. walk to the car.

T. stayed with Grandfather for "a couple weeks." Grandfather treated T. by changing his bandages every three days and giving him children's aspirin for the pain.

When Grandfather first saw T.'s burns, he did not think that T. needed to go to the hospital. "[A] few days later," he changed his mind.

Even then, Grandfather did not take T. to the hospital, but he did try to tell Tyler that T. needed to go to the hospital. At times, Tyler and C. would not pick up the phone, and he would have to leave messages. When they did pick up the phone, C. would answer, not Tyler.

On one occasion, Grandfather told Tyler that T. needed to go to a hospital. She responded, "[I]t's nothing[.]"

Tyler did not call Grandfather to check on T.'s condition, but Grandfather sent videos of T. to her. Tyler did not respond to the videos. The court admitted the videos into evidence, and the State played them for the jury.

While he was under Grandfather's care, T.'s wounds continued to worsen. Grandfather testified that, after he began to realize how severe T.'s injuries were, he tried to persuade Tyler and C. to go with him to the hospital. At first, they did not respond. Later they said that they could not find his insurance card.

Rather than take T. to the hospital, Grandfather returned T. to Tyler's apartment and told her and C. that they needed to take him to the hospital. Over the next two days,

Tyler and C. texted Grandfather multiple times, asking him to return and pick up T. When Grandfather returned to Tyler's apartment to take a laptop computer to K., he saw T. lying in bed with loose bandages. He took T. to the hospital.

Grandfather stated that he did not take T. to the hospital sooner, despite the severity of his burns, because he was an employee of the school system and was obligated to notify the police of suspected child abuse. Grandfather was afraid that he would lose his job because he had not taken T. to the hospital as soon as he saw how badly injured T. was. He was also looking out for Tyler, he said.

On cross-examination, Grandfather admitted that he originally told the police that he first saw T.'s injuries on the day when he took T. to the hospital. The State had charged him with first-degree child abuse and other offenses, but it amended the charges and allowed Grandfather to plead guilty to reckless endangerment after he changed his statement and admitted that he had seen T. on the day he was burned. Grandfather regretted that he did not take T. to the hospital because he knew from experience that T. required hospital care.

E. Dr. Allison Jackson's Testimony

Dr. Allison Jackson, an expert in pediatric medicine and child abuse trauma, testified that she met with T. in the intensive care unit at the hospital on June 1, 2020, two days after his admission. Dr. Jackson observed that most of T.'s torso and arms were covered with surgical dressings and that he had "healing burns to his face."

Dr. Jackson examined T.'s lower extremities. On his right inner thigh, she observed a hyperpigmented (i.e., a darkened) area in the shape of a "U" or a loop,

measuring 1.5 centimeters (or about six-tenths of an inch) in length. On T.'s left thigh, Dr. Jackson identified two areas with hyperpigmented parallel lines, measuring two centimeters (or about eight-tenths of inch) in length—one in the middle and one at the top of his thigh near his groin. The State introduced photographs that Dr. Jackson took of T.'s legs.

In Dr. Jackson's experience, the patterns of the injuries on T.'s legs were not consistent with accidental injuries. She explained that accidental falls do not typically involve injuries to the upper thigh area, nor do they leave a visible "pattern." The loop pattern on T.'s thighs was consistent with cases in which children have been beaten with cords that are folded over in a rounded "U" shape or with the side of a belt. Dr. Jackson explained that thighs "are high target zones for physical discipline" and that the pattern of parallel lines on T.'s thighs was "particularly concerning for child abuse[.]"

Dr. Jackson found the amount of burning on T. suspicious. She was concerned that T.'s severe and extensive burns were foul-smelling and "not new," as evidenced by the various stages of healing. She noted that the extensive distribution of burns over nearly 30 percent of his body would have been excruciatingly painful and traumatic. She opined that the delay in treatment of his burns was "a red flag for abuse." Even if the burns were accidental, she opined that the delay in treatment was a "red flag for neglect[.]"

Dr. Jackson characterized the burns as "suspicious." On cross-examination, however, she stated that T.'s burns were not "typical" of those of children who have been

subjected to physical abuse. She could not determine whether T. had been burned intentionally or by accident.

F. Tyler's Testimony

Tyler took the stand in her own defense. She testified that, on the day when T. was burned, K. was sleeping on the futon in the living room. The six children were in the bedroom they shared.

Tyler testified that she turned the stove on and filled a pot with approximately one gallon of oil to fry chicken. When she opened the refrigerator to remove the chicken, she noticed spilled cereal on the floor. Believing that T. was responsible for the spilled cereal, Tyler brought him into the kitchen to show him the mess and reprimand him. According to Tyler, while raising her voice and gesturing in frustration, her arm hit the pot, causing it to flip over and to spill hot oil on T. She claimed that she too was burned in the spill. She denied that she intended to spill or pour oil on T.

After T. was burned, Tyler immediately put him in a cold shower. She removed him from the shower, wrapped him in a towel, and placed him on her bed. She claimed that she did not notice any redness or raised marks on him at that time.

Someone called Tyler's parents—she was not sure who. Her parents arrived while T. was in her bedroom. Tyler and Grandfather, who, Tyler said, was "familiar with burns," went to a drugstore to get burn cream, Neosporin, and bandages for T.

Tyler testified that she allowed her parents to take T. to their house because she thought they "knew what was best." T. stayed with his grandparents for "a few weeks."

Tyler did not have a phone and did not have "much communication" with T. while

he was at her parents' home, but she did use C.'s phone "from time to time." She visited T. once while he was at her parents' home. Her parents had to pick her up and take her to their home in Howard County because Tyler did not have a car.

Tyler testified that she did not speak with her parents about T.'s treatment or condition while he stayed with them, and she denied saying that T. did not need to go to the hospital. She acknowledged that she saw the videos that Grandfather had sent to her. Still, she claimed to have thought that T. was getting good care from her parents.

Tyler testified that her parents brought T. back to her apartment one night at about 11:30 p.m. or midnight. Tyler claimed that she was "upset" when she saw T.'s condition.

T. stayed at Tyler's house for one night. On the following day, she said, her parents returned and took T. to the hospital. Tyler testified that she did not know why her parents came back, that she did not ask them to take T., and that she did not know that they were taking T. to the hospital. Nonetheless, she claimed that she was happy that T. went to the hospital.

Tyler asserted that she could not take T. to the hospital because she did not have a car. She acknowledged, however, that she could have called an ambulance to transport him. When asked by her own lawyer why she did not call 911, she responded, "I don't know."

Tyler denied applying rubbing alcohol to T.'s hand, lighting a match, and igniting his skin on fire. She testified that she did not burn him intentionally.

On cross-examination, Tyler agreed that it would have been appropriate for her to seek medical attention for T.'s injuries on the day he was burned, but that she did not do

so.

Also on cross-examination, Tyler denied telling the hospital staff that T. had been burned by hot water. The State introduced a medical record stating that T.'s mother had said that he had been burned by hot water.

II. Closing Argument

During closing argument, the prosecutor argued that child abuse could be based on either an affirmative act, such as burning T., or by a failure to act or provide treatment to T. Tyler's counsel objected. The court overruled the objection.

III. Jury Deliberations

During the jury's deliberations, it sent the trial court a note with the following question: "On Count 2, is it specifically focused on the day of the incident – i.e., was it on purpose or was it an accident – or can it also encompass behavior until [T.] goes to the hospital?"

Over Tyler's objection, the court instructed the jury as follows: "You should consider all of the evidence you heard in court, from the day of the incident to the day of the hospital admission, decide the facts, and then apply the law as set forth in the jury instructions to those facts."

Shortly after the court addressed the question, the jury returned with a verdict.

IV. Verdict and Appeal

The jury convicted Tyler of first-degree child abuse, second-degree child abuse, conspiracy to neglect a minor, and neglect of a minor.

This timely appeal followed.

DISCUSSION

I. Sufficiency of the Evidence

Tyler contends that the evidence at trial was insufficient to support her conviction of first- and second-degree child abuse, conspiracy to neglect a minor, and neglect of a minor.

In assessing the sufficiency of the evidence supporting a criminal conviction, we 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.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis in original); *accord Stanley v. State*, 248 Md. App. 539, 564 (2020). "In applying that standard, we give 'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *McClurkin v. State*, 222 Md. App. at 486 (quoting *Harrison v. State*, 382 Md. 477, 488 (2004)); *accord Stanley v. State*, 248 Md. App. at 564.

On appellate review, a court will not "retry the case" or "re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence." *Smith v. State*, 415 Md. 174, 185 (2010); *accord Stanley v. State*, 248 Md. App. at 564. The relevant question is "not whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Fraidin v. State*, 85 Md. App. 231, 241 (1991) (emphasis in original); *accord Stanley v. State*, 248 Md. App. at 564-65.

A. Child Abuse

"Abuse" of a child is defined by statute as "physical injury sustained by a minor as a result of cruel or inhumane treatment or as a result of a malicious act under circumstances that indicate that the minor's health or welfare is harmed or threatened by the treatment or act." Md. Code (2002, 2021 Repl. Vol.), § 3-601(a)(2) of the Criminal Law ("CL") Article.

Second-degree child abuse occurs when a "parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor" causes "abuse to the minor." CL § 3-601(d)(1)(i). First-degree child abuse occurs when a "parent, family member, household member, or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor" causes abuse that "causes severe physical injury to the minor[.]" CL § 3-601(b)(1)(i).

"Severe physical injury" is defined to include physical injury that:

1. creates a substantial risk of death; or
2. causes permanent or protracted serious:
    A. disfigurement;
    B. loss of the function of any bodily member or organ; or
    C. impairment of the function of any bodily member or organ.

CL § 3-601(a)(5)(iii).

Tyler does not dispute that T. was a child, that she was his parent, or that T. suffered severe physical injury. Instead, she contends that the evidence was insufficient to prove that she intended to injure T. and insufficient to prove that T. was injured as a

result of "cruel or inhumane treatment" or "a malicious act"—the statutory definition of "abuse." She was, she argues, only "ignorant or careless."

"Cruel[]" treatment is "the wanton and unnecessary infliction of pain upon the body." *Bowers v. State*, 283 Md. 115, 125-26 (1978) (quoting *Black's Law Dictionary* (4th ed. 1968)). "[I]nhumane" treatment is an act "'lacking the qualities of mercy, pity, kindness, or tenderness[.]'" *Id*. (quoting *Webster's Third New International Dictionary* (1961)). "Malicious" means "[c]haracterized by, or involving, malice; having, or done with, wicked or mischievous intentions or motives; wrongful and done intentionally without just cause or excuse." *Black's Law Dictionary* 863 (5th ed. 1984).

"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." *Fisher v. State*, 367 Md. 218, 270 (2001). "[T]he mens rea of child abuse does not involve an accused's subjective belief." *Id.*

Viewed in the light most favorable to the State, there was ample evidence to sustain Tyler's child abuse convictions. A rational jury could find that Tyler subjected T. to "cruel or inhumane treatment" or committed a malicious act when she intentionally lit his hand on fire or when she failed to seek or obtain necessary medical care in the aftermath of his severe, extensive, painful, and disfiguring burns.

The jury was free to reject Tyler's claim that she had accidentally spilled hot oil on T. Instead, the jury could credit K.'s testimony that Tyler had told her that she had intentionally applied rubbing alcohol to T.'s hands and ignited his skin as a punishment

for spilling his cereal. "Choosing between competing inferences is classic grist for the jury mill." *Cerrato-Molina v. State*, 223 Md. App. 329, 337 (2015).

In addition, the jury could infer that T. was burned by fire rather than hot oil because of K.'s testimony that she saw him engulfed "in flames" from his midsection "upwards on his body," that he was "charred" after the flames were extinguished, and that she saw his burnt tank top on the bathroom floor.

Dr. Burd's expert testimony corroborated Tyler's admission to K. that T. was burned by a flame rather than hot oil. According to Dr. Burd, flame burns tend to be deeper than "spill scald" burns because clothing traps the heat from the flame and causes a deeper injury. T.'s burns had the characteristics of flame burns, because he had "full thickness skin loss[,]" where his skin was burned "down to the level of fat, with exposed fat." According to Dr. Burd, "the extent and depth of [T.'s] neck injury" was not consistent with the "story" that the burns were caused by a spilled pot of hot oil.[1]

Furthermore, the jury could find that Tyler's conduct evidenced her consciousness of her guilt. She failed to seek or obtain professional medical attention for the severely injured child for several weeks, which a jury could interpret as an attempt to conceal what

[1] Tyler argues that the State's experts could not state "with certainty" that T.'s burns "were a product of intentional child abuse." The State, however, need not prove a defendant's guilt "with certainty." *See Ruffin v. State*, 394 Md. 355, 357 & n.1 (2006) (endorsing Maryland Criminal Pattern Jury Instruction 2:02). Nor must expert witnesses express their opinions "with certainty." *See, e.g., Miller v. State*, 421 Md. 609, 625-26 (2011).

she had done. She tried to persuade her sister K. to lie about how the injury had occurred. And she expressed concern to K. about going to jail.

In short, a jury could reasonably find that T. suffered physical injury as a result of cruel or inhumane treatment or a malicious act—an act that the State fairly characterizes as "sadistic"—when Tyler intentionally set the child's hand on fire.

Alternatively, a jury could reasonably find that T. suffered physical injury as a result of cruel or inhumane treatment when Tyler failed, over the course of several weeks, to seek or obtain professional medical assistance for her grievously injured child.

A parent's failure "to seek or obtain any medical assistance" when "the need therefor [i]s obviously compelling and urgent" is "cruel or inhumane treatment" within the meaning of the child abuse statute. *State v. Fabritz*, 276 Md. 416, 425 (1975); *accord Pope v. State*, 284 Md. 309, 328 (1979); *Robey v. State*, 54 Md. App. 60, 77-79 (1983).

Here, there is no serious question that T.'s need for medical assistance was "obviously compelling and urgent": he had suffered third-degree burns over almost 30 percent of his body; his body was "charred"; in some places, his flesh had been burned away down to the level of fat; he could not walk without assistance; his untreated wounds became so badly infected that pus was literally dripping off of them; and he was in such pain that he was treated with morphine when he finally received professional medical attention. T.'s need for medical assistance would have been obvious to any reasoning adult, and it was certainly obvious to Tyler: Grandfather told her that she could not hide what had happened, and both he and Tyler's sister K. told her that T. needed to go to the hospital.

Nor is there any serious question that Tyler failed to seek or obtain medical treatment for her child. Over the course of several weeks, she never called a doctor and never called 911. Instead, she handed the child to Grandfather, a layperson, from whom he received inadequate in-home care. She appears to have almost completely ignored the child while he was in Grandfather's hands. She also appears to have thwarted Grandfather's efforts to obtain professional care, by avoiding his calls, claiming that she could not find T.'s insurance card, failing to heed his advice that T. needed to go to a hospital, and claiming that T. was "fine." Even when Grandfather returned the child to her, she failed, for as much as two additional days, to seek or obtain medical treatment for him although his wounds were "obviously infected" and were "dripping" pus. This evidence was more than sufficient to permit a reasonable jury to find that Tyler abused T. by failing to seek or obtain medical care for his third-degree burns.[2]

In arguing that the circuit court erred in allowing the State to argue that the failure to seek or obtain medical treatment could evidence child abuse and in instructing the jury to that effect, Tyler compares her case to *Fabritz*. The comparison does not aid her case.

In *Fabritz*, 276 Md. at 418, Virginia Fabritz had left her three-year-old daughter, Windy, in the care of her neighbors, including Tommy Crockett, a man with whom she

[2] Tyler relies on Dr. Jackson's testimony that a delay in treatment could signify neglect of an accidental injury. Dr. Jackson also opined, however, that the delay in treatment of T.'s burns was "a red flag for abuse." In any event, apart from Dr. Jackson's testimony, there was an abundance of evidence in this case from which a jury could reasonably find that Tyler did not merely neglect her child, but that she acted cruelly and inhumanely by failing "to seek or obtain any medical assistance" for him even though "the need therefor was obviously compelling and urgent." *State v. Fabritz*, 276 Md. at 425.

was romantically involved. *See Fabritz v. Traurig*, 583 F.2d 697, 700 (4th Cir. 1978) (Haynsworth, C.J., dissenting). When Fabritz returned at 1:00 p.m., Windy was listless. By 2:30 p.m., Windy was complaining of cramps and running a fever. *Fabritz v. State*, 276 Md. at 418. Fabritz bathed the child and observed her "badly beaten body," but did not seek medical care. *Id.* At about 5:00 p.m., Windy "appeared to be in a semiconscious state," but Fabritz "did not take her to the hospital" because she was "'too ashamed of the bruises on her daughter's body.'" *Id.* Windy seemed to improve for a while, but at 6:00 p.m. "she vomited" and "complained that she did not feel well." *Id.* At 7:00 p.m. Fabritz put the child to bed and called a friend. *Id.* at 419. When the friend arrived at 9:00 p.m. "Windy was lying on the floor . . . covered by a wet diaper" and "appeared limp and unconscious. *Id.* When the friend asked about the bruises, Fabritz said, "'Tommy [Crockett] hits hard.'" *Id.* The child's condition "worsened," and about an hour later, Crockett's wife took her to the hospital, where she died. *Id.* When Fabritz learned of the child's death, she said, "'It's my fault. I killed her.'" *Id.*

On these facts, the Court, in a 6-1 decision, affirmed Fabritz's conviction for child abuse. In reaching its decision, the court reasoned that the failure to seek or obtain medical assistance was cruel and inhumane:

> That Virginia knew of Windy's severely beaten condition in manifest from the evidence; indeed, as the photographic exhibits in the case so painfully demonstrate, Windy bore the multiple bruises of a vicious assault, of which Virginia was aware at least as early as 2:30 p.m. on October 3, 1973. Between that hour, and 10:35 p.m. when Windy died, Virginia failed to seek or obtain any medical assistance although, as the evidence heretofore outlined so plainly indicates, the need therefor was obviously compelling and urgent. There was evidence that Virginia's failure to seek such assistance was based upon her realization that the bruises covering Windy's

> body would become known were the child examined or treated by a physician.

Id. at 425.

The Court concluded:

> We think the jury properly could have concluded from the evidence that, as a result of Virginia's conduct, Windy's condition was permitted to steadily deteriorate until the child's ordeal was ended by death; that Virginia's failure to act caused Windy to sustain bodily injury additional to and beyond that inflicted upon her by reason of the original assault and constituted a cause of the further progression and worsening of the injuries which led to Windy's death; and that in these circumstances Virginia's treatment of Windy was 'cruel or inhumane' within the meaning of the statute and as those terms are commonly understood.

Id. at 425-26.

Tyler points out that, in response to Fabritz's petition for writ of habeas corpus, a divided panel of the Fourth Circuit voided her conviction on the premise that the evidence was insufficient to show that she "had knowledge of the critical gravity of her daughter's condition when she deferred resort to medical advice for the little girl." *Fabritz v. Traurig*, 583 F.2d at 698. Despite the evidence that she saw "multiple severe bruises (later counted as 70) on the child, apparently caused by body blows,"[3] despite Fabritz's statement that "'Tommy [Crockett] hits hard[,]'" and despite her admission that she did not take the child to the hospital because she was "'too ashamed of the bruises on her [daughter's] body[,]'" the majority asserted that she "was totally ignorant of when or how [the blows] had been inflicted." *Id.* at 698-99. The majority reasoned that Fabritz

[3] *Id.* at 698.

may have committed an "error of judgment, however dreadfully dear, but there was no awareness of wrongdoing on her part." *Id.* at 700. It concluded:

> Fabritz' error amounted to a failure to procure medical attention in less than eight hours after her arrival at home. Without expert medical knowledge to place her on notice of the fatal nature of the child's illness, she treated her as best she knew. The misjudgment was only to the significance of the symptoms and of the immediacy of demand for professional care. In these circumstances the conviction cannot stand without even so much as a murmur of evidential justification.

Id.

Chief Judge Haynsworth dissented. He wrote: "[Fabritz's] statements to the neighbor before the child was dead of her reasons for not having sooner sought medical help furnished support for a finding that for some hours the mother consciously refrained from seeking medical help to protect Crockett from possible criminal charges and to support her own ego." *Id*. at 701 (Haynsworth, C.J., dissenting). Maryland's highest court also rejected the conclusion of the Fourth Circuit majority, noting that, "unlike decisions of the Supreme Court of the United States, decisions of federal circuit courts of appeals construing the federal constitution and acts of the Congress pursuant thereto, are not binding upon us." *Pope v. State*, 284 Md. 309, 320 n.10 (1979).

Neither of the *Fabritz* decisions supports Tyler's contention that the evidence was insufficient to prove that she acted cruelly and inhumanely. Unlike Fabritz, who could claim not to have known at first how her child had been injured and how bad the injuries were, Tyler knew from the outset that her son had been badly burned (whether because she had set his hand on fire or because she accidentally spilled a pot of hot oil on him). Furthermore, unlike Fabritz, who waited just a few hours before seeking and obtaining

treatment, Tyler waited for weeks—and even then, Grandfather, and not Tyler herself, took T. to the hospital. Because T.'s wounds became infected during the weeks-long delay, Tyler's "failure to act caused [T.] to sustain bodily injury additional to and beyond that inflicted upon [him] . . . and constituted a cause of the further progression and worsening of the injuries[.]" *State v. Fabritz*, 276 Md. at 425-26. A jury could find that Tyler's prolonged failure to obtain professional medical assistance for her son "was not an excusable error in judgment[.]" *Robey v. State*, 54 Md. App. at 79.

In summary, the evidence was far more than sufficient for a reasonable jury to find that Tyler abused T., either by setting him on fire or by failing to seek or obtain professional medical care for his third-degree burns.

B. Neglect

Child neglect is "the intentional failure to provide necessary assistance and resources for the physical needs or mental health of a minor that creates a substantial risk of harm to the minor's physical health or a substantial risk of mental injury to the minor." CL § 3-602.1(a)(5)(i). "The standard . . . is whether the parent intentionally failed to provide necessary assistance and resources for the physical needs of the child by acting in a manner that created a substantial risk of harm to the child, measured by that which a reasonable person would have done in the circumstances." *Hall v. State*, 448 Md. 318, 331 (2016).

According to Tyler, "there was no dispute that [T.] was neglected." She contends, however, that Grandfather, and not she, was guilty of that neglect because, she says, Grandfather was T.'s primary caretaker after T. suffered his burns.

Tyler's contentions notwithstanding, a reasonable jury could find that she neglected T. T. obviously needed professional medical treatment for his extensive burns, but she handed the injured child to Grandfather for whatever treatment he might be able to provide at his home. She almost completely ignored her son during the weeks when he was with Grandfather, visiting him only once and not responding to the videos that Grandfather sent. She failed to heed the suggestions by K. and Grandfather that T. needed to go to a hospital. She made no effort to obtain medical assistance during the two days or so after Grandfather returned the child to her. And she had no explanation for why she never called for emergency services. The evidence was more than sufficient to sustain Tyler's neglect conviction.

C. Conspiracy to Commit Child Abuse

Conspiracy is a common-law crime that "consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Mitchell v. State*, 363 Md. 130, 145 (2001). "A conspiracy may be shown through circumstantial evidence, from which a common scheme may be inferred." *Hall v. State*, 233 Md. App. 118, 138 (2017). "'The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose or design.'" *Bordley v. State*, 205 Md. App. 692, 723 (2012) (quoting *Townes v. State*, 314 Md. 71, 75 (1988)).

Tyler argues that she did not enter into any agreement to deny T. medical treatment after he was burned. She contends that, initially, neither she nor Grandfather believed that T. needed to go to the hospital. When Grandfather eventually insisted that

T. needed to go to the hospital, she admits that she disagreed with him but says that Grandfather "took T. to the hospital anyway."

In our judgment, a reasonable jury could find that Tyler conspired with Grandfather to treat T. cruelly and inhumanely. Tyler knew that she had caused serious injuries to her child, but she did not call 911. Instead, she called Grandfather. Upon his arrival he told her that she could not hide what had happened and left. After receiving another call from Tyler, however, he returned later and took the child. He explained that he did what he did in part because he was looking out for Tyler—i.e., he was trying to protect her. This evidence supports an inference that Tyler and Grandfather entered into an agreement under which Grandfather would take T. to his home to care for him in an effort to avoid a child abuse investigation: Grandfather testified that he did what he did in part because he was looking out for Tyler.[4]

"The crime of conspiracy is complete when the agreement to undertake the illegal act is formed." *Savage v. State*, 226 Md. App. 166, 174 (2015). Thus it makes no difference that Grandfather may have withdrawn from the conspiracy when he suggested that Tyler should take T. to a hospital, returned T. to Tyler's apartment and (approximately two days later, when he saw that Tyler had not taken T. to the hospital) took T. there himself.

[4] The jury could also have found that Tyler's wife, C., and Grandfather's wife were parties to this tacit agreement to protect Tyler and to conceal T.'s injuries by depriving T. of professional medical assistance.

II. Closing Argument and Jury Note

A. The State's Closing Argument

Tyler argues that the circuit court erred in permitting the prosecutor to misstate the law of child abuse in closing argument. Specifically, she challenges the prosecutor's statement that child abuse could be predicated on Tyler's "inaction" in failing to seek medical treatment for T. She argues that her failure to obtain medical treatment for T. did not amount to child abuse because, she says, her behavior was not motivated by cruelty or malice.

Tyler's challenge to the prosecutor's comment on the evidence in closing argument fails for the same reasons that her sufficiency challenge to her child abuse convictions failed. In the circumstances of this case, a jury could find—and thus the State could certainly argue—that Tyler committed child abuse when she failed to seek or obtain professional medical assistance for her severely injured son for several weeks, while his condition worsened. It makes no difference that Tyler claims not to have been subjectively motivated by cruelty or malice. *See Fisher v. State*, 367 Md. at 270. The circuit court did not abuse its discretion in permitting the State to argue that the jury could convict Tyler of child abuse because of her failure to seek or obtain professional medical treatment for T. *See, e.g., Whack v. State*, 433 Md. 728, 742 (2013); *Ingram v. State*, 427 Md. 717, 726 (2012); *Spain v. State*, 386 Md. 145, 152 (2005).

B. The Trial Court's Response to the Jury Note

In the course of its deliberations, the jury sent a note asking whether the charge of second-degree child abuse was "specifically focused" on whether T. was burned "on

purpose or by accident" or on whether the charge could "also encompass behavior until [T.] goes to the hospital?" Over Tyler's objection, the court instructed the jury as follows:

> You should consider all of the evidence you heard in court, from the day of the incident to the day of this hospital admission, decide the facts, and then apply the law as set forth in the jury instruction to those facts.

Tyler challenges the instruction. She suggests that the court should simply have referred the jury to the instructions that it had already given. She asserts that the guilty verdict was based on the court's instruction, "confirming what the jury had been told by the State during closing argument," that Tyler's failure to seek or obtain medical treatment for T.'s burns was child abuse.

Maryland Rule 4-325(a) states that the court shall instruct the jury at the close of the evidence and "may supplement" those instructions "when appropriate." "Supplemental instructions can include an instruction given in response to a jury question." *Appraicio v. State*, 431 Md. 42, 51 (2013). In a supplemental instruction given in response to a jury's question, the answer "must accurately state the law and be responsive to jurors' questions without invading the province of the jury to decide the case." *Id.* at 44.

"We review a trial court's decision to give a particular jury instruction[,]" including a supplemental instruction, "under an abuse of discretion standard." *See, e.g.*, *Appraicio v. State*, 431 Md. at 51. "'Where the decision or order of the trial court is a matter of discretion it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable

grounds, or for untenable reasons." *Id.* (quoting *Atkins v. State,* 421 Md. 434, 447 (2011)) (further citation omitted).

"'[C]ourts must respond with a clarifying instruction when presented with a question involving an issue central to the case.'" *Id.* (quoting *Cruz v. State*, 407 Md. 202, 211 (2009)). Here, the issue was plainly central to the case—the jury wanted to know whether it could convict Tyler of child abuse if she accidentally burned her child but failed to seek or obtain necessary medical assistance for his burns.

Furthermore, the instruction did not impermissibly invade the province of the jury by, for example, advising the jurors about what inferences they could draw from the facts. *Appraicio v. State*, 431 Md. at 53. Instead, the instruction concerned a pure question of law—could the jury convict Tyler of child abuse if she failed to seek or obtain medical assistance for T.'s injuries? Accordingly, the trial court appropriately advised the jurors to consider all of the evidence submitted in the case, from the day of T.'s injury until his hospital admission, and to apply the law to those facts. The trial court's supplemental instruction to the jury was neither erroneous nor an abuse of discretion.

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