Circuit Court for Baltimore City
Case No. 113303023

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1859

September Term, 2017

MURIEL MORRISON

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Eyler, James R., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: August 23, 2019

Muriel Morrison shared a bed with her four-year-old daughter and her four-month-old baby, I.M., on the night of September 1, 2013. When Ms. Morrison awoke the next morning, she found I unresponsive. She called 911 for help. When the paramedics arrived, they took I to Johns Hopkins Hospital, where she was pronounced dead at 8:41 a.m. Ms. Morrison was charged with involuntary manslaughter, first-degree assault, second-degree assault, and reckless endangerment in connection with I's death.

In March 2016, Ms. Morrison was tried by a jury in the Circuit Court for Baltimore City and found guilty of involuntary manslaughter, reckless endangerment, and neglect of a minor. She received a separate consecutive sentence for each offense. She appeals on two grounds: *first*, that the evidence was insufficient to support her convictions, and *second*, that any remaining convictions should merge. We agree with Ms. Morrison that the evidence was insufficient to support her convictions for involuntary manslaughter and reckless endangerment and reverse those counts, but hold that her argument as to the neglect charge was not preserved by a motion for judgment of acquittal and affirm that count.

I. BACKGROUND

On the evening of September 1, 2013, Ms. Morrison put I and her four-year-old daughter to sleep in a shared bed. Later that evening, Ms. Morrison consumed beer over a two-hour period, laid down beside her children, and fell asleep. Ms. Morrison's older daughter awoke during the night and saw her mom lying on top of I. The girl attempted to wake her mother up, but Ms. Morrison did not respond. In the morning, Ms. Morrison woke

up to find I lifeless on the bed and her older daughter playing on the floor nearby. Ms. Morrison called 911; both paramedics and police responded.

Ms. Morrison's jury trial lasted three days. Paramedic Jamel Jones was the State's first witness. He testified that he encountered Ms. Morrison's four-year-old daughter when he arrived at the scene. She told him that her baby sister, I, was not breathing so he ran into the house and saw Ms. Morrison walking down the stairs with I in her arms. I wasn't crying or moving, so the Paramedic began trying to resuscitate her immediately. He took I, by ambulance, to Johns Hopkins Hospital, where additional attempts were made to restore her breathing and heartbeat, without success.

Ms. Morrison's older daughter testified next. She said that on the night of I's death, she went downstairs to get some juice, came back to the bedroom and found her mother lying on top of I. She called for help and tried to wake her mother up, first by yelling, and then by throwing things at her; she also answered the phone and spoke to her father. She described her mom as being in a "deep, deep sleep" before she woke up. She also recalled talking to the police at her house.

The State then called Sergeant Laron Wilson, who arrived at the house after I had been taken to the hospital. He was called to the scene while on patrol in the area and was the first police officer to arrive. He entered the house and found Ms. Morrison sitting on the bed with a "blank stare on her face," looking as if she was in shock. When he asked if she was okay, Ms. Morrison responded "No. I killed my baby. I got drunk. I killed my baby." Sergeant Wilson immediately took steps to preserve the scene until the detectives

arrived to begin their investigation.

Next, the State called social worker Latonya Townsend, who met with Ms. Morrison in the hospital after I was declared dead. Ms. Morrison told her that after she put the girls to sleep in her bed, she had about two or three beers and then went to bed herself. Ms. Morrison said that when she woke up she found I at the other end of the bed—her lips were blue, and her body was rigid.

Detective Jonathan Jones testified that he met Ms. Morrison at Johns Hopkins Hospital, after she and I had been transported there. He testified that when he asked Ms. Morrison what happened, she told him that the night before she had put her two children down in the bed that she shared with them—between 10 p.m. and midnight—and then she began drinking alcohol. After that, she said, she didn't know what had happened—she woke up and I was unresponsive. Detective Jones said that he followed up with Ms. Morrison in a videotaped interview at the police station where Ms. Morrison voluntarily waived her Miranda rights and agreed to talk about what happened. The court granted the State's motion to admit the videotaped interview as evidence and publish it for the jury to watch.

In the interview, Ms. Morrison said that she had consumed "a couple of cans" of beer that evening, including part of a forty-ounce beer. Sometime after she put I and her four-year-old to bed, at about 2:30 a.m., she went back to change I's diaper and then fell asleep herself. Ms. Morrison testified that when she woke up, her four-year-old was playing on the floor and I was lying motionless on the bed. She said that her four-year-old told her

that she had rolled over onto I, but she had no recollection of that happening. Detective Jones had Ms. Morrison taken to Mercy Hospital where her blood was drawn but never analyzed.

Next, the State played excerpts from the deposition of Dr. Ana Rubio, the medical examiner who performed I's autopsy. Dr. Rubio testified that the autopsy report itself did not reveal I's cause of death. She ultimately concluded that I's cause of death was an accident caused by "probable overlay," based not only on the autopsy findings, but also on information she received from the forensic investigator indicating that I had been sleeping "on the bed" with Ms. Morrison on the day of her death and that "[I] was found under [Ms. Morrison's] body . . . unresponsive." Dr. Rubio testified that co-sleeping[1] was not considered safe, and that the evidence of co-sleeping justified eliminating Sudden Infant Death Syndrome and Sudden Unexplained Death in Infancy as possible causes of I's death.

[1] We will use the term "co-sleeping," as it was used throughout the record, to refer to an act that is more aptly described as "bed-sharing" or "the practice of sleeping in the same bed with one's child." Bed sharing, *Merriam-Webster's Dictionary*, https://www.merriam-webster.com/dictionary/bed%20sharing.

Co-sleeping (including bed-sharing) is a practice commonly used by mothers, like Ms. Morrison, who breastfeed at night. Madeline Kennedy, *Co-sleeping linked to breastfeeding*, REUTERS (Feb. 24, 2016, 3:46 PM), https://www.reuters.com/article/us-health-breastfeeding-bed-sharing/co-sleeping-linked-to-breastfeeding-idUSKCN0VX2PV. In 2016, the American Academy of Pediatrics released a policy statement recommending mothers sleep in the same room as their infants, but not in the same bed. It also warned against "[p]arent alcohol and/or illicit drug use in combination with bed-sharing" because it "places the infant at particularly high risk of [sudden infant death syndrome]." Rachel Y. Moon et al., *SIDS and Other Sleep-Related Infant Deaths: Expansion of Recommendations for a Safe Infant Sleeping Environment*, 128 PEDIATRICS 1030, 1034 (2016), https://pediatrics.aappublications.org/content/128/5/1030.

The State rested, and Ms. Morrison moved for judgment of acquittal as to all counts but one.[2]

> **[DEFENSE COUNSEL]:** Motion for judgment of acquittal as to all counts, Your Honor. I would state that as to Count Number 1, manslaughter, the State has not even in the light most favorable to the State shown that gross negligence exists here.
>
> We have no conscientiousness of a high risk of harm that is intentionally disregarded, Your Honor.
>
> **THE COURT:** I'm listening?
>
> **[DEFENSE COUNSEL]:** To -- to the extent that we have --
>
> **THE COURT:** Go ahead?
>
> **[DEFENSE COUNSEL]:** -- Count -- very good, your Honor -- Count Number 2, there is no establishment of the intent required to create the offensive touching. It is a mother who is caring for and breast feeding her child.
>
> There is nothing about the act itself that is intentionally designed to cause --
>
> **THE COURT:** Well . . . where is the testimony that she was breast feeding at this stage? You've got to remember what stage you're at.
>
> **[DEFENSE COUNSEL]:** Very good, Your Honor.
>
> ***
>
> **[DEFENSE COUNSEL]:** Very good. And at least -- I would just submit, Your Honor, that there is no manifestation [of] an intent to -- to cause an offensive touching.
>
> With respect to the -- and -- and I say that understanding that if -- even if the State is going to suggest that offensive touching did occur, that it had to have occurred at a time when my client could not be conscientious of that.

[2] Through counsel, Ms. Morrison orally moved for judgment of acquittal "as to all counts," but only articulated arguments surrounding her charges for involuntary manslaughter, second-degree assault, and reckless endangerment, not neglect of a minor.

> **THE COURT:** Well, by using that word that it had to have occurred, isn't that a -- fact that's in dispute [] by definition at this stage[?]
>
> ***
>
> **[DEFENSE COUNSEL]:** I'm just saying that -- that to the extent that you talk about an offensive touching, which is what you have to have in order to establish assault, it would have to have occurred at a moment when intent could not exist. And that's my concern, Your Honor.
>
> **THE COURT:** Well, I totally disagree with that. []
>
> **[DEFENSE COUNSEL]:** With respect to reckless endangerment, Your Honor, there are no facts that would, in the light most favorable to the State, suggest that my client intentionally disregarded a substantial risk of death. This is a mother who sleeps with her children. There is nothing inherently risking death about that process. To the extent that we talk about negligence, Your Honor, there is a duty. And my client does have an obligation to provide care. I will submit.

The trial court denied Ms. Morrison's motion, and she took the stand to testify in her own defense. She described the day she spent with her two daughters, and how they were home at around 10:00 p.m. getting ready for bed. Ms. Morrison acknowledged that she and her daughters shared a bed, but that she had been raised sleeping in bed with her mother, as her mother had before her, that it was a common practice in her family and community, and that she didn't recall being told it was unsafe**.** She put her older daughter in bed with a movie, then sat up with I for a while before putting her to bed as well by around midnight.

Ms. Morrison also acknowledged that she had participated in a virtual "mom[']s night" with some friends on Facebook. She admitted telling police that she had consumed two twelve-ounce beers and part of a forty-ounce beer over the course of a couple of hours, but claimed that it didn't prevent her from doing "everything [she] normally d[id]" as she

changed I's diaper, took out the trash, turned off her daughter's movie, and got ready for bed. She testified that her older daughter woke her up in the night to return a missed call from the girl's father, but that he hadn't answered, so she went back to sleep. She said her four-year-old woke up again at 4:00 or 4:30 a.m. to go to the bathroom. According to Ms. Morrison, her four-year-old said she wanted to feed I, but Ms. Morrison said no and "put [her] arm over top of [I] . . . [and] kept ignoring her because [she] wanted [her] to go back to sleep." Then Ms. Morrison woke up suddenly around 8:00 a.m., realized I wasn't next to her, and then found her in the bed—her lips were pale and she wasn't breathing, so Ms. Morrison began CPR and called 911. When the paramedics arrived, she told them that she had realized while performing CPR that it was "too late." They took I to the hospital, and Ms. Morrison went upstairs; when an officer came upstairs, she said "[n]o matter what, it's my fault. I couldn't save her."

At the close of all the evidence, Ms. Morrison unsuccessfully renewed her motion for judgment of acquittal "based on the same arguments." The jury convicted Ms. Morrison of involuntary manslaughter, reckless endangerment, and neglect of a minor. On October 30, 2017, the sentencing court imposed a twenty-year sentence: ten years for involuntary manslaughter concurrent with two five-year sentences for reckless endangerment and neglect of a minor, with all twenty years suspended and five years' probation to follow. She filed this timely appeal.

II. DISCUSSION

Ms. Morrison raises two issues on appeal. *First*, she contends that the evidence

adduced at trial was not sufficient to support her convictions of involuntary manslaughter, reckless endangerment, and neglect of a minor.[3] *Second*, she contends that her convictions should have been merged for sentencing purposes. Because we agree that the record does not support two of her three convictions and we find that her third argument on appeal was not properly preserved, we need not reach the merger question.

A. The Evidence Was Insufficient To Support Ms. Morrison's Conviction For Involuntary Manslaughter.

We review the sufficiency of evidence to support a conviction in the light most favorable to the prosecution. *See Perry v. State*, 229 Md. App. 687, 698 (2016). In doing so, we will not re-weigh the evidence, but will ask whether *any* rational jury could have found that the evidence proves "the essential elements of the crime beyond a reasonable doubt." *State v. Coleman*, 423 Md. 666, 672 (2011) (internal citations and quotations omitted).

> Involuntary manslaughter at common law has been generally defined as the killing of another unintentionally and without malice (1) in doing some unlawful act not amounting to a felony, or (2) in negligently doing some act lawful in itself, or (3) by the negligent omission to perform a legal duty. To this basic definition some authorities add the qualification . . . as to the second and third classes of the offense, that the negligence be criminally culpable, i. e., that it be gross.

Mills v. State, 13 Md. App. 196, 199–200, 282 (1971) (internal citations omitted). Because none of the acts leading to I's death were unlawful, the State needed to prove (and the court

[3] She argues as well that if we hold that she failed to preserve the insufficiency argument because she did not argue it with sufficient particularity at trial, the failure should be treated as ineffective assistance of counsel and we should reach the claim on that basis.

instructed the jury that it would need to find) that Ms. Morrison "acted in a grossly negligent manner and that this grossly negligent conduct caused [I's] death." The court also instructed the jury, correctly, that gross negligence "means that the defendant, while aware of the risks, acted in a manner that created a high degree of risk to and showed a reckless disregard for human life." On appeal, both parties addressed only the gross negligence theory of involuntary manslaughter.

The *actus reus* of this crime is not in dispute. Ms. Morrison's infant daughter died when she rolled over onto her while they slept in the same bed. Everybody agrees that the death resulted from two acts and decisions: *first*, Ms. Morrison's decision to drink alcohol before bed, and *second*, her decision to sleep in the same bed with her children. The issue is whether her decision to drink alcohol or her decision to sleep with an infant, or the two combined, could be found by a rational jury to rise to the level of gross negligence. We agree with Ms. Morrison that, on this record, they cannot.

To prove gross negligence, the State must prove that the defendant not only understood the potential consequences of her actions, but also that she went ahead with an unlawful and wanton indifference to them:

> In general, the "gross negligence" *mens rea* is established by asking whether the accused's conduct, under the circumstances, amounted to a disregard of the consequences which might ensue and indifference to the rights of others. The defendant must commit an act so heedless and incautious as necessarily to be deemed unlawful and wanton. The act must manifest such a gross departure from what would be the conduct of an ordinarily careful and prudent person under the same circumstances so as to furnish evidence of indifference to the consequences. Moreover, the defendant, or an ordinarily

> prudent person under similar circumstances, should be conscious of this risk.

State v. Thomas, No. 33, Sept. Term 2018, slip op. at 16 (Md. June 24, 2019) (cleaned up).

Generally, "[Maryland] courts have discussed gross negligence involuntary manslaughter in four main contexts: automobiles, police officers, failure to perform a duty, and weapons." *Id.* Ms. Morrison is right that "[t]here are no Maryland appellate decisions dealing with the type of negligence necessary to support a finding of involuntary manslaughter based on co-sleeping." The State also is right that none of the out-of-state cases that Ms. Morrison cites compels a reversal in itself. Each case turns on its own individual constellation of circumstances. Unlike the defendant in *State v. Merrill*, 269 P.3d 196 (Utah Ct. App. 2012), Ms. Morrison has never had a child die from co-sleeping, and there was no suggestion that she was aware that co-sleeping could be deadly, even if risky. There similarly was no suggestion, as there had been with the co-sleeping defendant in *Bohannon v. State*, 498 S.E.2d 316 (Ga. Ct. App. 1998), that Ms. Morrison was a problem drinker. Ms. Morrison drank beer and fell deeply asleep, but there was no reason on this record for her to believe that her drinking or co-sleeping, individually or in combination, posed a deadly threat to her children.

The State argues that "from [the] evidence, a rational trier of fact could find that [Ms.] Morrison fell asleep in the same bed as her infant daughter after drinking so much beer that she passed out, i.e., she did not know and was unable to recall what happened and did not respond when 'stuff' was thrown at her." Fair enough. But with all of that—even if we take at face value Ms. Morrison's statement to Sergeant Wilson that she was "drunk"

when she went to bed *and* we assume that although she denied being told the risks of co-sleeping, she knew that co-sleeping with a four-month-old while drunk was risky—we disagree that her conduct and the circumstances support "a permissible inference of wanton and reckless disregard for human life." *Thomas*, No. 33, Sept. Term 2018, slip op. at 22.

We recognize that gross negligence is a question of fact. Even so, this record lacks any factual support for a finding that Ms. Morrison was aware that either of her daughters' lives were at risk when she went to bed with them on September 1, 2013. To be sure, Ms. Morrison's decision to drink and share a bed with her children had lethal consequences. But without some evidence that Ms. Morrison (or an ordinarily careful and prudent person in her position) had reason to know she risked those consequences, and that she went ahead despite knowing the risks, her conviction for involuntary manslaughter must be reversed.

B. The Evidence Is Insufficient To Support Ms. Morrison's Conviction Of Reckless Endangerment.

Reckless endangerment is a statutory offense that prohibits a person from "recklessly engag[ing] in 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 ("CR"). "The elements of a prima facie case of reckless endangerment are: 1) that the defendant engaged in conduct that created a substantial risk of death or serious physical injury to another; 2) that a reasonable person would not have engaged in that conduct; and 3) that the defendant acted recklessly." *Jones v. State*, 357 Md. 408, 427 (2000).

Like involuntary manslaughter, reckless endangerment requires an objective *mens*

rea analysis:

> Guilt under the statute does not depend upon whether the accused intended that his reckless conduct create a substantial risk of death or serious injury to another. The test is whether the appellant's misconduct, viewed objectively, was so reckless as to constitute a gross departure from the standard of conduct that a law-abiding person would observe, and thereby create the substantial risk that the statute was designed to punish.

Holbrook v. State, 364 Md. 354, 367 (2001) (cleaned up). We look, then, to whether the State presented sufficient evidence to prove that Ms. Morrison's decision to co-sleep with her young children after social drinking represented a "gross departure" from what "a law-abiding person would observe," that her conduct created a "substantial risk of death or serious physical injury" to I *and* that she acted recklessly. *Id.*

The State argues that Ms. Morrison's "admittedly drunken condition" alone is enough for "a rational trier of fact [to] find that . . . [she] created a substantial risk of death or serious physical harm to the children" because she was their "sole caretaker" and "[s]he was unavailable to [them] when she was drunk." From there, the State claims that "[r]egardless of whether co-sleeping by itself would be sufficient to permit a rational trier of fact to find that [Ms.] Morrison's conduct in doing so was grossly negligent, the additional evidence presented during [her] trial certainly permitted the finding." Without citing any evidence, the State goes on to say that "[e]ven if an ordinarily prudent adult would co-sleep with an infant in a full-sized bed and subject the child to the risk of asphyxiation, it defies common sense to suggest that the same ordinarily prudent adult would do so in a self-described drunken state."

Ms. Morrison contends that the State offered no evidence demonstrating that she knew that sleeping with her children could pose a "substantial life[-]threatening risk" to I. She argues as well that there was no evidence "either that she was intoxicated when she co-slept with her infant daughter, or that imbibing . . . beer posed a substantial risk to [I]'s continued health."

Viewing the evidence in the light most favorable to the State, we cannot find sufficient evidence to support this conviction beyond a reasonable doubt. There is no evidence that Ms. Morrison's decision to co-sleep—even after drinking beer—objectively created a substantial risk of harm to her children. And in the same way that the evidence didn't support a finding that Ms. Morrison acted with "reckless disregard" for her daughter's life, it also falls short in demonstrating objectively that she acted with "conscious disregard" or "wanton indifference" to the possibility that her actions could cause harm to I. *Williams v. State*, 100 Md. App. 468, 474–76 (1994). We reverse the conviction for reckless endangerment as well.

C. Ms. Morrison's Sufficiency Of The Evidence Argument Relating To Her Conviction For Neglect Of A Minor Was Not Preserved.

"A claim of insufficiency of the evidence" must be made "as a part of the motion for judgment of acquittal," if it is to be preserved. *Graham v. State*, 325 Md. 398, 417 (1992). Under Maryland Rule 4-324(a), the defendant bringing the motion must state "with particularity all reasons why [it] should be granted," and our review of a decision to deny such a motion generally is limited to the reasons raised in the motion. *Poole v. State*, 207 Md. App. 614, 632–33 (2012).

Ms. Morrison's first two insufficiency arguments were the subject of unambiguous motions for judgment of acquittal, both at the end of the State's case and then again after hers, but neither motion included any argument relating to the charge of neglect of a minor. In a footnote in her brief, Ms. Morrison cites *Testerman v. State*, 170 Md. App. 324 (2006), and argues that to whatever extent we find her motion for judgment of acquittal "was not specific enough on any of the[] charges," she asks that we review her challenge nevertheless through the lens of ineffective assistance of counsel.

On this record, we are not persuaded to upend the usual process and address trial counsel's effectiveness on direct appeal. Normally, "a post-conviction proceeding is the 'most appropriate'" mechanism for such an argument because it allows the parties to develop a record on, among other things, the reasons counsel might have opted tactically not to make a motion for judgment. *Id.* at 335 (*quoting Mosley v. State*, 378 Md. 548, 558–59 (2003)). We express no views on the merits, either as to whether the evidence was sufficient to support the conviction for neglect or on the (in)effectiveness of Ms. Morrison's counsel in not making a motion for judgment on that count.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND REVERSED IN PART. COSTS TO BE PAID 67% BY THE MAYOR AND CITY COUNCIL OF BALTIMORE AND 33% BY APPELLANT.