Circuit Court for Baltimore City
Case No.: 114212030

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2841

September Term, 2015

CIERRA MONET CURTIS

v.

STATE OF MARYLAND

Arthur,
Reed,
Zarnoch, Robert, A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: March 18, 2019

Tried by a jury in the Circuit Court for Baltimore City, Appellant, Cierra Monet Curtis, was convicted of second-degree murder, first-degree child abuse, and second-degree assault.[1] The trial court sentenced Appellant to a total of 40 years in prison,[2] after which she timely noted this appeal, presenting the following questions for our consideration:

1. Did the trial court abuse its discretion by permitting the State to inject into the case a new theory of culpability for second-degree murder by instructing the jury as to depraved heart, in addition to specific intent?

2. Did the trial court impermissibly consider uncharged and unproven conduct in sentencing Appellant?

3. Did the trial court err in failing to merge for sentencing Appellant's conviction for second-degree assault into her conviction for second-degree murder?

For the reasons that follow, we conclude that the trial court should have merged Appellant's conviction for second-degree assault into her conviction for second-degree murder for sentencing purposes. Therefore, we shall vacate the sentence for second-degree assault and remand for resentencing. Otherwise, we shall affirm the judgments of the trial court.

[1] The jury acquitted appellant of first-degree assault.

[2] Appellant was sentenced to 30 years' incarceration for second-degree murder, a concurrent 30 years' incarceration for first-degree child abuse, and a consecutive ten years for second-degree assault.

(Continued)

PROCEDURAL AND FACTUAL BACKGROUND

At approximately 11:50 p.m. on June 30, 2014, Baltimore City Police Department Agent Rachelle Sweet and Officer Maunda Williams undertook a traffic stop in the 5800 block of Reisterstown Road, across the street from a Red Roof Inn.[3] When Agent Sweet exited his vehicle, he heard a distraught female "yelling and screaming;" he turned to find the woman, later identified as Appellant, running toward him from the direction of the hotel.

After screaming, "I swear I'm not a bad mother," Appellant told the officers that her son, 20-month-old Jayden Curtis, was not breathing. Agent Sweet and Officer Williams then observed a man, later identified as Appellant's boyfriend, Kevin Green, running toward them with the child in his arms.

To the officers, Jayden appeared unresponsive and was cool to the touch. Agent Sweet commenced CPR, while Officer Williams called for medical assistance. Lifesaving efforts continued at Sinai Hospital, but Jayden Curtis was pronounced dead shortly after midnight on July 1, 2014.

The State's Assistant Medical Examiner, Dr. Zabiullah Ali, conducted the autopsy on Jayden Curtis. The child exhibited numerous contusions and/or lacerations, which Dr. Ali opined to be less than 48 hours old, to his ears, frenulum, scalp, buttocks, thighs, lower

[3] Some witnesses alternately refer to the hotel as a Red Carpet Inn.

(Continued)

back, and left flank.[4] Dr. Ali's observation of the interior of Jayden's abdomen revealed a laceration of the mesentery—a fold of membrane that attaches the intestine to the abdominal wall—which the doctor stated would have been painful, leading to unconsciousness and death if not treated within approximately one hour. In Dr. Ali's expert medical opinion, Jayden died from multiple blunt force injuries, and the manner of death was a homicide.

Kevin Green testified regarding the events leading to the June 30, 2014 death of Jayden Curtis. In June of 2014, he and Appellant were involved in a romantic relationship; at the time she was pregnant with his child.[5] On June 29, 2014, Green helped Appellant and Jayden move out of his mother's house, where they had been living "on and off" but were no longer welcome. The plan was for Appellant to move into her grandmother's house, but she was not happy about the change.

As Green, Appellant, and Jayden walked from Green's mother's house in Randallstown to the Old Court Road subway station with their belongings, Jayden whined because it was hot and he wanted to be carried. During the walk, Appellant suffered from some cramping, so instead of going to her grandmother's house, the trio took the subway to the University of Maryland Hospital, which was so crowded they decided not to wait,

[4] Although Dr. Ali found numerous older injuries to Jayden, the court ruled, in *limine*, that injuries to the child caused more than 48 hours prior to his June 30, 2014 death would not be admissible, as the State had not charged appellant with prior abuse. Dr. Ali was instructed to testify in accordance with the court's ruling.

[5] Green was not Jayden's father.

and then to Johns Hopkins Hospital, where Appellant was kept overnight; Green and Jayden slept in the hospital waiting room.

At approximately 11:00 the next morning, the trio got a ride to the Rogers Avenue subway station, where Appellant and Jayden waited while Green walked to his boss's nearby office to pick up wages he was due. Green's boss was not at the office, so Green made arrangements to meet him later that afternoon. Green then returned to the subway station to find Jayden whining and crying because he had not eaten all day.

At approximately 5:00 p.m., after Green received $260 in cash from his boss, he, Appellant, and Jayden walked to a Subway restaurant to get something to eat. Appellant was adamant that she did not want to go to her grandmother's house, so she and Green decided to get a hotel room at the Red Roof Inn for the night. Green purchased some clothing, soap, and snacks from a dollar store next to the hotel, and the group entered their hotel room at approximately 7:00 p.m.

Once inside, Green unpacked their clothes to wash in the bathroom sink, while Jayden sat on the bed watching TV and eating a snack. As the clothes soaked in the bathroom sink, Green and Appellant argued about their future living arrangements, with Green telling Appellant she had to return to her grandmother's house, as he could not afford a hotel indefinitely. Appellant was also angry that Green had cancelled their plans for a night out, because he had to work the next day.

Green, in an attempt to assuage Appellant, told her to soak in the bathtub with Jayden while he purchased her some wine from a liquor store that was approximately a 15 minute walk from the hotel. When he returned, Jayden was on the bed eating snacks, and

Appellant was angry because the knob to control the water into the tub was broken and she had to shower Jayden and herself.

Green washed the clothes he had been wearing and took a shower, after which he observed Appellant putting Jayden to sleep. When the child lifted his head to look at Green, Appellant pushed his head back down onto the bed and yelled at him to lie down. She also hit him on his leg and side before throwing him face-first on the bed. She left the room to get something to eat but returned a moment later because the restaurant was closed.

Green picked up Jayden, who was whining and crying, to console him. Green left the room for a moment, to confirm that Appellant had been telling the truth about the restaurant being closed, and returned to find Jayden on the bed with Appellant rubbing his back. When Jayden continued to whine and try to lift his head from the bed, Appellant pushed his head back down and struck him again.

Green went into the bathroom to try to fix the tub and to continue washing clothes. When he exited the bathroom 10 to 15 minutes later, Jayden was lying on his side on the bed, whining and struggling to breathe. Green asked what was wrong with the child, and Appellant said he might be sick, or was perhaps hungry or dehydrated. Green yelled at her to get help. As Appellant left the room, Jayden began to vomit through his nose.

Green attempted to resuscitate Jayden. Appellant returned to the room saying that someone was coming to assist, although Green later stated he did not believe she actually asked anyone for help because she feared that Child Protective Services would label her "a

bad parent" and take Jayden away from her.[6] When he saw flashing police lights across the street, Green assumed it was someone coming to help, so he told Appellant to run. He then followed, with Jayden in his arms. At that point, Agent Sweet and Officer Williams took over CPR on Jayden. When they were notified of Jayden's death, Green and Appellant screamed and cried, and Appellant was briefly admitted to the hospital.

Green and Appellant were transported from Sinai Hospital to the police station in the early morning hours of July 1, 2014, where they were interviewed by homicide Detectives Michael Moran and Gary Niedermeier, after waiving their *Miranda* rights. Following the police investigation, including the interviews of Green and Appellant, execution of a search warrant in their hotel room, interviews of hotel guests, and interview of the hotel security officer, the police developed Appellant as the only suspect in Jayden Curtis's death.[7]

[6] During Appellant's later recorded interview with the police, the interviewing detective revealed that he knew that the hotel's security officer had suggested she call 911 when she approached him about her sick baby, but she responded, "No, he's okay now."

[7] Appellant's and Green's redacted recorded interviews from July 1, 2014 were played for the jury, but the transcriptionist found both recordings completely inaudible and did not transcribe them on the record. Appellant filed a motion to supplement the record with transcripts of the interviews, which was granted by this Court on December 27, 2016.

During her interview, appellant denied that Green would ever harm Jayden, but she also denied harming the child herself and claimed that the child's injuries could not have happened in the hotel room. During his interview, Green denied that Appellant had ever done more than give Jayden a "pat on the butt, smack on the hand," although he later conceded he had previously seen her punch him a few times on his leg. He said he did not see her discipline Jayden the night of his death.

DISCUSSION

I. Jury Instruction

In moving for judgment of acquittal, Appellant argued that the trial court should grant her motion on the charge of second-degree murder because the State had not proved who delivered the blunt force trauma that caused Jayden's death, and even if it were Appellant, the State had not shown her required intent to kill. In seeking the State's response, the court asked:

> I'm focusing on the one thing in the light most favorable to the State. Where is the intent to kill the baby; or to inflict such serious bodily harm that death would be the likely result? This is anger. This is frustration.
>
> That, in the moment that [t]he serious bodily injury is projected, that the moment is to kill or to kill or to cause such serious bodily injury that death would be the result.
>
> Not a reckless act. Not an act that, in hindsight, you wish you didn't do. But, at the time delivered was with the intent to kill. Where is it?

The State responded that Appellant's anger and frustration built throughout the day of Jayden's death because she did not want to be with Jayden; she wanted to have a night out with Green, and she intentionally inflicted the blows to Jayden so he would not be a hindrance to her plans for the evening. The court denied Appellant's motion for judgment of acquittal on the charge of second-degree murder.[8]

[8] Relating to the other charged crimes, Appellant merely incorporated her argument on the second-degree murder charge. The court denied Appellant's motion on the remaining offenses.

Appellant did not offer any evidence. After she rested her case, the court denied her renewed motion for judgment of acquittal, ruling that if the jury believed Green's testimony, "the intent is there" to support a conviction of second-degree murder.

The trial court then proceeded to its "charging conference," a discussion of the parties' proposed jury instructions. The court noted that the State asked for an instruction on second-degree depraved heart murder and involuntary manslaughter without having charged those crimes, specifically. As charged in the indictment, the court read, Appellant "did kill and murder willfully and with malice, aforethought, pursuant to 2-204, 2-208."[9] Defense counsel stated, "That is the Defense's objection, Your Honor."

The court pointed out that CL §2-208 does not require the State to set forth the manner and means of death in charging second-degree murder, or to distinguish the type of murder. Therefore, if the State had shown that there was a death and an act that could

[9] Md. Code (2012 Repl. Vol., 2016 Supp.), §2-204 of the Criminal Law Article ("CL"), renders any murder that is not in the first degree a murder in the second degree and imposes a sentence of not more than 30 years. CL §2-208 states:

> (a) *Contents.*—An indictment for murder or manslaughter is sufficient if it substantially states:
>
> "(name of defendant) on (date) in (county) feloniously (willfully and with deliberately premeditated malice) killed (and murdered) (name of victim) against the peace, government, and dignity of the State.".
>
> (b) *Manner and means of death.*—An indictment for murder or manslaughter, or for being an accessory to murder or manslaughter, need not set forth the manner or means of death.

(Continued)

have caused the death, which it had, it was up to the jury to determine if and in what manner the factual scenario fit the charged crime. As any one of the instructions on second-degree murder would be appropriate, the court concluded, it agreed to give the second-degree murder instruction, as set forth in Maryland Pattern Jury Instructions-Criminal ("MPJI-Cr.") 4.17(b),[10] as well as the State's requested instruction on second-degree depraved heart murder in MPJI-Cr. 4.17.8.[11]

[10] MPJI-Cr. 4.17(b) states:

> Second degree murder is the killing of another person with either the intent to kill or the intent to inflict such serious bodily harm that death would be the likely result. Second degree murder does not require premeditation or deliberation. In order to convict the defendant of second degree murder, the State must prove:
>
> (1) that the defendant caused the death of (name); and
>
> (2) that the defendant engaged in the deadly conduct either with the intent to kill or with the intent to inflict such serious bodily harm that death would be the likely result.

[11] MPJI-Cr. 4.17.8 states, in pertinent part:

> SECOND DEGREE DEPRAVED HEART MURDER
> Second degree murder is the killing of another person while acting with an extreme disregard for human life. In order to convict the defendant of second degree murder, the State must prove:
>
> (1) that the defendant caused the death of (name);
>
> (2) that the defendant's conduct created a very high degree of risk to the life of (name); and

(Continued)

Defense counsel objected on the ground that the second-degree depraved heart murder instruction was more appropriate in cases in which the State had charged multiple levels of homicide, *e.g.*, murder and manslaughter. When the court indicated it would give the depraved heart instruction, defense counsel made no further objection. At the close of the discussion on the State's and defense's proposed jury instructions, the court asked, "Any issues or questions?" and both the prosecutor and defense counsel answered, "No, Your Honor."

Shortly thereafter, the court instructed the jury in accordance with its discussion with counsel during the charging conference. At the completion of the instructions, the court asked, "Before I send you to lunch, does anyone have a question or a problem for the good of the group?" The transcript indicates there was no audible response.

During its deliberations the next morning, the jury sent the court a note asking, "Does second degree depraved heart murder fall under the charge as to the charge of murder in the second degree?" When the attorneys were asked if the court's proposed response—essentially reiterating its initial second-degree murder instructions—was acceptable, defense counsel asked only that the court rephrase the instruction slightly "for uniformity" but stated he was "fine with the rest of the instruction."

> (3) that the defendant, conscious of such risk, acted with extreme disregard of the life endangering consequences.

A. Parties' Contentions

Appellant contends that the trial court abused its discretion in instructing the jury on the depraved heart modality of second-degree murder, when that theory had not previously been advanced by the State. Because it was "the understanding of all parties" that "the State was pursuing a specific intent theory of culpability for second-degree murder," she concludes, the injection of a "new theory" into the case during jury instruction was impermissible.

The State first raises a preservation argument, on the grounds that Appellant did not timely object to the jury instruction about which she now complains and that her objection, once made at trial, was on a different ground than the one raised in her appeal. In addition, the State continues, Appellant waived her right to appeal on this issue by declaring she was "fine" with the supplemental instruction as given. If addressed, the State concludes, Appellant's claim is meritless, as the trial court acted within its discretion in giving the instruction.

B. Standard of Review

As we explained in *Albertson v. State*, 212 Md. App. 531, 551-52, *cert. denied*, 435 Md. 267 (2013),

> Maryland Rule 4–325(c) provides: 'The court may, and at the request of any party shall, instruct the jury as to the applicable law and the extent to which the instructions are binding.' We review a trial judge's decision whether to give a jury instruction under the abuse of discretion standard. In determining whether a trial court has abused its discretion, we consider (1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the

> facts of the case; and (3) whether it was fairly covered in the instructions actually given.

(Internal citations and some quotation marks omitted).

C. Analysis

Although Appellant opposed the court's second-degree depraved heart murder instruction during the charging conference, she made no objection to the instruction when it was actually given to the jury (either initially or supplemental as a result of the jury's question during deliberation), and she affirmatively stated she was "fine" with the re-instruction. Therefore, pursuant to Maryland Rule 4-325(e), she has failed to preserve her right to appeal on this ground;[12] she concedes as much in her brief.

Citing *Gore v. State*, 309 Md. 203 (1987), Appellant nonetheless claims that she substantially complied with the rule by asserting her position on the instruction during the charging conference. In *Gore*, the Court of Appeals did hold that substantial compliance with Rule 4-325(e) may be sufficient to preserve review of an assigned error, but only under "limited circumstances" and only when the following conditions are met:

> there must be an objection to the instruction; the objection must appear on the record; the objection must be accompanied by a definite statement of the ground for objection unless the ground

[12] Rule 4-325(e) states, in pertinent part:

> **(e) Objection.** No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection.

> for objection is apparent from the record and the circumstances must be such that a renewal of the objection after the court instructs the jury would be futile or useless.

Id. at 208-9.

There is nothing in the record of this matter to indicate that an objection after the court instructed the jury would have been futile. The court did not foreclose further discussion on the subject and, in fact, asked, at the completion of the jury instructions, if anyone had a "question or a problem," to which neither side responded. Therefore, we are not persuaded that Appellant substantially complied with the Rule so as to preserve her claim of error. Moreover, when the court offered substantially the same instruction in response to the jury's question during its deliberations, defense counsel stated he was "fine" with the instruction, thereby affirmatively waiving any objection. *See Choate v. State*, 214 Md. App. 118, 130, *cert. denied*, 436 Md. 328 (2013).

Even were we to consider Appellant's argument, she would not prevail. Appellant relies heavily on *Cruz v. State*, 407 Md. 202 (2009), in support of her claim that a new theory of culpability should not be injected into a criminal trial after both parties have presented their cases. *Cruz*, however, is readily distinguishable from the case at bar.

Cruz was convicted of second degree assault. *Id*. at 204. Before closing arguments, the State requested a jury instruction on the common law battery version of assault, but did not request an instruction on either of the other types of assault: intentionally frightening another with the threat of an immediate battery and attempting to commit a battery. After closing arguments, in response to a question from the jury during its deliberations, the court instructed the jury on attempted battery. *Id*.

The Court of Appeals concluded that it was improper for the trial court to give the supplemental instruction after it agreed to instruct the jury only on battery, the sole second-degree assault theory advanced by the State. *Id*. The Court held that the trial court's supplemental instruction, although generated by the evidence, was not appropriate because it was given after closing arguments and therefore prejudiced Cruz by depriving him "of an adequate opportunity to defend against the new theory of culpability." *Id*. at 222. The Court expressly noted, however, that at the close of the evidence, the State "would have been entitled to an instruction on any version of second degree assault as each theory constituted the 'applicable law' under Rule 4–325." *Id*.

Here, the trial court notified the parties that it would give the second-degree depraved heart murder instruction at its charging conference after both sides had rested their cases but before closing arguments. The State was entitled to the instruction on any version of second-degree murder at that time. The court explained its rationale at length, and defense counsel was aware of the possibility of a conviction based on second-degree depraved heart murder and was able to tailor his closing argument accordingly. Unlike in *Cruz*, Appellant was given the opportunity to defend against the depraved heart theory of culpability. We perceive no unfair prejudice to her in the court giving the second-degree depraved heart murder instruction and find no abuse of discretion by the trial court in doing so.

II. Sentencing Considerations

As Appellant points out, the trial court refused to admit any evidence of abuse to Jayden Curtis that was likely inflicted prior to the 48 hours preceding his July 1, 2014,

death, on the ground that the State had not charged Appellant with prior abuse. The evidence of the recent injuries was sufficient to cause the jury to convict Appellant of second-degree murder, first-degree child abuse, and second-degree assault.

During her allocution at sentencing, Appellant continued to maintain her innocence in Jayden's death, denied that her statement to the police about not being a "bad mother" meant she had done anything wrong, and alluded to "someone" threatening her with taking something precious away from her if she took his freedom away. The court referenced Jayden's un-redacted medical records, which the jury had not seen, and disputed Appellant's claim she was not a bad mother by pointing out that the medical examiner had observed bite marks "[a]ll over" Jayden's body, which Appellant must have seen but did not report to the police or to a doctor.

Ready to pronounce sentence, the court told Appellant she was "just not worthy of belief" when she said she did not know what happened to her child. The court continued:

> I don't believe that a mother would let someone else—at the hands of their—of someone else hurt their child. I know too much about mothering to know that, in my instances, a mother would lay her own life down to protect her child.
>
> * * *
>
> What moves me are the fractures that I saw on those films that show that that child had been hurt, injured, and beaten all of his little life. What hurts me is the testimony of the police officer—who has in his mind to the rest of his days—your son looking at him as he rendered CPR and the eyes that rolled back in his head because he just couldn't take it anymore.
>
> * * *
>
> No, I do not think you should be a mother to another child. No, I am fearful that, if you are ever given the opportunity to

> mother another child, that that child's life is in serious jeopardy.
>
> And, I am saying straight to you as a judge who heard the evidence; as a judge who's heard the—saw the pictures. As a person who has sat on this bench for 17 years, I have never seen anything so horrendous in my life.
>
> And at 59 years of age, it is an absolute disgrace what you let happen to that child.

A. Parties' Contentions

Appellant claims that the trial court erred in considering uncharged and unproven acts of prior abuse and/or neglect of Jayden in crafting its sentence. Because the court ruled, in *limine*, that the jury would hear no evidence of abuse to Jayden prior to the 48 hours preceding his death, Appellant continues, the court should not have relied upon evidence of past abuse, especially in the absence of any evidence that it was she who inflicted that abuse. The State urges us not to consider Appellant's claim in the absence of an objection during sentencing.

B. Standard of Review

There are only three grounds for appellate review of sentences: "'(1) whether the sentence constitutes cruel and unusual punishment or violates other constitutional requirements; (2) whether the sentencing judge was motivated by ill-will, prejudice or other impermissible considerations; and (3) whether the sentence is within statutory limits.'" *Ellis v. State*, 185 Md. App. 522, 551 (2009) (emphasis omitted) (quoting *Jackson v. State*, 364 Md. 192, 200 (2001)). "[A]llegations of impermissible considerations at sentencing

are not 'illegal sentences' subject to collateral or belated review and 'must ordinarily be raised in or decided by the trial court[.]'" *Abdul-Maleek v. State*, 426 Md. 59, 69 (2012),

C. Analysis

Appellant has again failed to preserve this issue for appellate review. Rule 4–323(c), applicable to rulings and orders other than evidentiary rulings, provides that an objection must be made "at the time the ruling or order is made or sought" in order to be preserved for appellate review. It is well settled that challenges to sentencing determinations are generally waived if not raised during the sentencing proceeding. *Bryant v. State*, 436 Md. 653, 660 (2014).

As we stated in *Reiger v. State*, 170 Md. App. 693, 701 (2006),

> [w]hen, as in this case, a judge's statement from the bench about the reasons for the sentence gives rise to the claim of impermissible sentencing considerations, defense counsel has good reason to speak up. A timely objection serves an important purpose in this context. Specifically, it gives the court opportunity to reconsider the sentence in light of the defendant's complaint that it is premised upon improper factors, or otherwise to clarify the reasons for the sentence in order to alleviate such concerns. . . . Simply stated, when there is time to object, there is opportunity to correct.

(footnote and citation omitted). The waiver rules and rationales govern cases involving both failure to object to the sentencing court's consideration of impermissible factors and to its consideration of improper evidence. *Id*. at 700.

In the instant case, the parties do not dispute that defense counsel made no objection at the time of Appellant's sentencing. Notwithstanding the lack of a contemporaneous objection, however, Appellant asks us to exercise our discretion to review the issue, citing

Abdul-Maleek v. State, 426 Md. 59, 70 (2012), in which the Court of Appeals determined that impermissible sentencing considerations may be addressed on appeal in the absence of an objection, when the exercise of discretion will not "work unfair prejudice to either of the parties" and will "promote the orderly administration of justice."

The Court, in *Abdul-Maleek*, however, did nothing more than reassert the well-settled principle that Rule 8–131(a) grants an appellate court discretion to consider issues deemed to have been waived for failure to make a contemporaneous objection, and noting that such discretion should be exercised with caution. *Id*. at 69, 70. Although the *Abdul-Maleek* Court decided to undertake discretionary review, we decline to do so here because we are not persuaded that the sentencing court committed plain error.

Assuming *arguendo* that we did find plain error, we would still affirm the judgment. A sentencing court in a criminal proceeding is "'vested with virtually boundless discretion.'" *Martin v. State*, 218 Md. App. 1, 44 (quoting *State v. Dopkowski*, 325 Md. 671, 679 (1992)), *cert. denied*, 440 Md. 463 (2014), *cert. denied*, 135 S.Ct. 2068 (2015). Moreover, trial courts "are given very broad latitude in the kinds of information they may consider in [sentencing]." *Jennings v. State*, 339 Md. 675, 683 (1995); *see also Smith v. State*, 308 Md. 162, 165–69 (1986) (finding that testimony at sentencing regarding a report of attempted rape that was unrelated to the crime for which defendant was being sentenced, and for which he had not been charged, was admissible).

> In order to impose what is necessary to accomplish [the objectives of sentencing], [the sentencing judge] has a very broad latitude, confined only by unwarranted and impermissible information, to consider whatever he has learned about the defendant and the crime. The sentencing

> judge may consider, among other things, the evidence presented at the trial, the demeanor and veracity of the defendant gleaned from his various court appearances, as well as the data acquired from such other sources as the presentence investigation or any personal knowledge the judge may have gained from living in the same community as the offender. Moreover, a sentencing judge may properly consider uncharged or untried offenses.

Martin, 218 Md. App. at 45 (internal citations and quotation marks omitted).

Based on these principles, we perceive no error in the trial court's sentencing considerations. Although the court precluded the jury from receiving evidence of Appellant's alleged prior abuse of Jayden, as the State had not charged such abuse, there was competent evidence that Appellant had abused her son before June 30, 2014.

Kevin Green testified that he had seen Appellant smack and punch Jayden on occasions prior to the night of his death, and he testified to her pushing the child's head onto the bed, smacking his leg, and flinging him onto the bed on the night of his death. Although the assistant medical examiner was not permitted to testify to injuries received by Jayden more than 48 hours prior to his death, the un-redacted autopsy report, marked as an exhibit for identification purposes and reviewed by the court, indicated, in addition to the numerous recent blunt force injuries, remote injuries including scars on the child's neck, scalp, forehead, ear, face, chest, abdomen, left arm and left foot, healed abrasions on his neck, healing rib fractures, contusions on his left thigh, and old hemorrhage and fibrosis of his small bowel mesentery, all of which were consistent with ongoing child abuse. The court further considered Appellant's presentence investigation report and her demeanor upon her interview with the police hours after her child had been pronounced dead, as well

as her demeanor at the sentencing hearing, which included a continued failure to take any responsibility for the child's death.

Even if there was any doubt that it was Appellant who had inflicted the prior abuse, the sheer number of injuries on the child's body rendered it unbelievable to the court that Appellant would not have known that someone was abusing her child and still did nothing to stop it. The court's sentence, which did not exceed the statutory maximums for the crimes of which Appellant was convicted, was not based on impermissible considerations, and we perceive no error in its imposition.

III. Merger

The court sentenced Appellant to 30 years in prison for the second-degree murder conviction, along with a concurrent 30 years for the conviction of child abuse resulting in the death of a child. In addition, on what the court "clearly found to be a separate conviction for assault in the second degree, with evidence in the record to support other acts that were done to that child—the pulling, the beating, the spanking, the pushing, the kicking," it sentenced her to a consecutive ten years.

A. Parties' Contentions

Appellant argues that the trial court erred in failing to merge, for sentencing purposes, her conviction of second-degree assault into her conviction of second-degree murder. In her view, although *the court* found a basis for independent acts supporting separate crimes of assault and murder, it is not clear that *the jury* based its assault conviction on behavior separate and apart from the imposition of the injuries that caused

Jayden's death. In the absence of a determination of the basis for the jury's verdict on the two crimes, Appellant concludes, merger of the convictions is required.

The State counters that "a fair reading of the record" shows that the jury based its murder conviction on acts separate from assault, and therefore the offenses do not merge.

B. Standard of Review

A failure to merge a sentence is considered an illegal sentence, which may be corrected at any time. *See* Md. Rule 4-345(a). We "address the legal issue of sentencing in the case at bar under a de novo standard of review." *Blickenstaff v. State*, 393 Md. 680, 683, 904 A.2d 443 (2006).

C. Analysis

The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution forbids multiple convictions and sentences for the same offense. *See Holbrook v. State*, 364 Md. 354, 369 (2001). In addition, the common law rule of merger dictates that when criminal offenses merge, "separate sentences are normally precluded." *State v. Lancaster*, 332 Md. 385, 392 (1993). If a defendant is convicted of two offenses based on the same act or acts, and one offense is a lesser included offense of the other, the offenses merge, and separate sentences are prohibited. *Id*. at 391.

Generally, the test for determining the identity of offenses is the required evidence test. *Nightingale v. State*, 312 Md. 699, 703 (1988). "'The required evidence test focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements,

the former merges into the latter.'" *Lancaster*, 332 Md. at 391 (quoting *Snowden v. State*, 321 Md. 612, 617 (1991)).

"Merger occurs as a matter of course when two offenses are deemed to be the same under the required evidence test *and* 'when [the] offenses are based on the same act or acts[.]'" *Nicolas v. State*, 426 Md. 385, 408 (2012) (quoting *Holbrook*, 364 Md. at 370). If "factual ambiguities" arise at trial regarding whether the offenses are based on the same act, we resolve the ambiguity in the defendant's favor and find that the trial court should have merged the convictions for sentencing purposes. *Id.*

In considering whether a battery conviction should merge with a fourth-degree sexual offense conviction in *Cortez v. State*, 104 Md. App. 358, 368 (1995), we determined that the trial court could have found Cortez guilty of battery on the basis of acts separate and distinct from the sexual offense, or it could have found that the battery was an integral part of the sexual offense. Resolving the factual ambiguity in Cortez's favor, we concluded that "because we cannot tell whether the trial judge *did* find that Appellant committed a battery by the use of force separate and distinct from that used to commit the fourth degree sexual offense, we must resolve the doubt in favor of Appellant and vacate the sentence for battery." *Id*. at 361. *See also Snowden*, 321 Md. at 614, 619 (Unable to determine whether the events arose from the same transaction such that an assault and battery conviction should merge into a robbery conviction, the Court of Appeals resolved the factual ambiguity in the defendant's favor and merged the convictions).

In this matter, the evidence showed that Appellant pulled, smacked, and threw Jayden onto a bed within 24 hours of his death. The autopsy report and the medical

examiner's testimony supported a finding that she inflicted more pernicious injuries to the child within an hour of his death. Although the trial court, at sentencing, clearly found that the second-degree assault was separate from the injuries that supported the murder conviction, it is not entirely clear that is what the jury determined. The verdict sheet did not specify which injuries could support each conviction, and the prosecutor, during closing argument, did not explain to the jury how it could convict Appellant of the two crimes based on separate acts. Because there is a factual ambiguity as to whether the jury's convictions of second-degree murder and second-degree assault were based on the same or separate acts, we resolve the matter in favor of Appellant and merge the convictions for sentencing purposes. *See Dixon v. State*, 364 Md. 209, 244-45 (2001).

In light of our decision to vacate, we remand the case to the Circuit Court of Baltimore City for resentencing. *See Twigg v. State*, 447 Md. 1 (2016) (holding that the Court of Special Appeals, after vacating a portion of a sentence, has the authority to remand a case for resentencing).

SENTENCE FOR SECOND-DEGREE ASSAULT CONVICTION VACATED AND REMANDED BACK TO THE CIRCUIT COURT FOR BALTIMORE CITY FOR SENTENCING; JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY OTHERWISE AFFIRMED; COSTS ASSESSED 2/3 TO APPELLANT AND 1/3 TO MAYOR AND CITY COUNCIL OF BALTIMORE.