Circuit Court for Cecil County
Case No. 07-K-16-098 and 07-K-16-057

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 420

September Term, 2017

KEISHA T. HARRIS

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Leahy,

JJ.

Opinion by Graeff, J.

Filed: March 27, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Keisha Harris, appellant, was convicted by a jury in the Circuit Court for Cecil County of first degree child abuse, second degree child abuse, rendering a child in need of assistance, and two counts of neglect of a minor, relating to her children A.H. and N.H. The circuit court imposed a sentence of five years' imprisonment, all but 18 months suspended, for the conviction of first degree child abuse of N.H., to be followed by three years of supervised probation. The court imposed a consecutive 18 month sentence for the conviction of neglect of A.H. The remaining convictions were merged for sentencing purposes.

On appeal, appellant presents the following questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the trial court err in admitting evidence that appellant received food stamps and other state support?

2. Did the trial court err in denying the motion for acquittal as to child neglect of appellant's son because the prosecution presented insufficient evidence as a matter of law to convince a reasonable trier of fact that appellant intentionally failed to provide for her son, A.H.?[1]

For the reasons set forth below, we shall affirm the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

In 2015, appellant had four children: T.D., D.D., A.H., and N.H.[2] In September 2015, the Criminal Investigations Division of the Elkton Police Department became

[1] Appellant's initial brief presented a third question for review: Whether the jury's guilty verdicts on the charges of child abuse and neglect of N.H. were legally inconsistent. In her reply brief, however, appellant withdrew that issue.

[2] By the time of the trial in February 2017, appellant had given birth to a fifth child.

involved with appellant after T.D., who was then 15 years old, ran away from home. Kristen Berkowich, a Child Protective Services Assessor with the Cecil County Department of Social Services (DSS), went to appellant's home on September 11, 2015, to "assess the children and the allegations made" in a referral that DSS had received. D.D. was then 12 or 13; A.H. was three, and N.H. was 18 months old.[3] Ms. Berkowich stated that she was allowed to observe A.H. and N.H. "at a distance," but she was "not allowed to attempt to interact with them."

On December 29, 2015, Detective Lindsay Ziegenfuss executed a search warrant at appellant's home. She took photographs of the home, which were admitted into evidence and showed that the kitchen pantry and refrigerator were full of food.

Approximately two weeks later, on January 13, 2016, Detective Ziegenfuss learned that appellant and her husband had been arrested. Due to "concerns that there may not be an appropriate caregiver in the home," Detective Ziegenfuss and Ms. Berkowich went to appellant's home to "check on the well-being of the children."

Timothy Baker, who identified himself as a family friend, answered the door and advised that he was taking care of the children. He was unable to provide sufficient information to confirm his identity and allow DSS to run a "CPS clearance," i.e., a check of the person's information to make sure that the person does not have a history of child

[3] A.H was born in July 2012. N.H. was born in February 2014.

abuse or neglect. At that point, DSS decided to take the children, D.D., A.H, and N.H., into state care.

Ms. Berkowich testified that she had concerns regarding the children. N.H. was unable to stand and appeared to have difficulty walking and straightening out her feet. Her wrists were "very swollen," and she was "very dirty." A.H. appeared to have problems with his eyesight. One eye would "drift really severely to one side and then it would drift back." He "appeared not to be able to focus on anything."

N.H. and A.H. were taken for a medical examination at the Child Advocacy Center (CAC) three days after they were removed from the home. Following that examination, Dr. Stephen Breslow, the medical director of the CAC, contacted Dr. Allan DeJong, the Medical Director of the Children At Risk Program at Alfred I. duPont Hospital for Children in Wilmington, Delaware. Dr. Breslow was concerned about N.H and wanted Dr. DeJong, a pediatrician with expertise in areas of child abuse and neglect, to examine her.

Dr. DeJong saw N.H. on January 21, 2016. N.H. showed signs of undernourishment. She was "very underweight" at 18 pounds and seven ounces, which put her below the first percentile. Her abdomen protruded a "fair amount," and she had "obvious deformities" of her wrist and ankles. She had a persistent bend of the leg at the knee and was unable to straighten her legs or walk independently. Although N.H. was 22 months old at that time, she had the appearance of a child who was less than a year old.

N.H. was admitted to the hospital for 18 days. She was seen by orthopedic, endocrine, and nutritional specialists. Laboratory testing revealed that N.H. had low blood

levels of calcium and vitamin C and a severely deficient level of vitamin D. X-ray studies showed advanced bone disease and bone deformities that were consistent with scurvy and advanced rickets, conditions that were "not terribly common" and were caused by deficiencies of vitamin C and vitamin D, respectively.

Dr. DeJong, who was accepted by the trial court as an expert in pediatrics with a specialty in areas of child abuse and neglect, characterized N.H.'s condition as "severe malnutrition," explaining that she "wasn't getting enough protein and calories to grow normal in height and weight," and she was not getting adequate vitamin D and vitamin C to "maintain the integrity of her bones." Dr. DeJong attributed N.H.'s inability to fully extend the joints in her extremities to contraction of the muscles resulting from dietary deficiencies.

Dr. DeJong stated that such malnutrition puts a child at risk of death. He explained that severely undernourished children may not be able to absorb food through the intestine, and they may go into shock or die when they are fed adequately for the first time. He further explained that malnutrition by underfeeding can affect the brain, heart, and liver, potentially causing chronic or life-threatening conditions.

Dr. DeJong opined that N.H.'s condition rose to the level of neglect and abuse:

> This definitely rises to the level of neglect. This is a child who looking at her on examination, looking at the photographs again, both of her body [sic] but looking at the photographs again of her x-rays, this is a child who had severe obvious problems, and caretakers have to recognize when their child has severe visual problems, and they have to realize when their child is not gaining weight properly. And this is a child who had the visual appearance of a child who was not developing and growing properly. So that's neglect.

. . .

> I think this is a form of severe neglect that causes significant body changes, and I think in my mind that does rise to the level of abuse. Abuse doesn't have to be physical action against the body of a child. If it is something that is neglected and the child has physical changes that result from that and there is a risk of severe injury or death from that neglect, I think it rises to the level of abuse from a medical point of view.

After Dr. DeJong examined N.H., he directed that A.H. be brought to the hospital to be examined. Prior to the examination, Dr. DeJong reviewed records from the hospital's orthopedic department, where A.H. had been seen for a fractured femur when he was 10 months old. X-rays taken at that time showed a "general finding" of osteopenia, which Dr. DeJong described as "not enough calcium or density in the bones or not an appropriate amount of density in the bones." The treating doctors suspected bone disease and ordered laboratory testing to confirm or refute a suspected vitamin D deficiency. To Dr. DeJong's knowledge, the recommended testing was never done.

Dr. DeJong examined A.H. a week after N.H. was brought to the hospital. He performed an assessment of A.H.'s bones, general health, and nutrition. A.H.'s weight put him in the 10th percentile for his age. Dr. DeJong ordered x-rays, which revealed that A.H.'s bones were "not normal." A.H. had "continued osteopenia," albeit less severe than when he was 10 months old. Laboratory testing showed "generally healthy" levels of calcium and normal levels of vitamin D.[4]

[4] Dr. DeJong stated that a child who is deficient in Vitamin D can show corrected levels on laboratory testing within a few days to a week of being given adequate amounts

Dr. DeJong noted that A.H. had strabismus, or a "turning in of his left eye," and that there was "diminished vision" in that eye. Dr. DeJong did not know when the condition had developed, and he was "concerned seeing a child with strabismus at this age that intervention may have been needed" previously. Dr. DeJong explained that strabismus in an infant, if not addressed very quickly, can lead to sudden blindness.

Dr. DeJong stated that the first step in medical treatment for strabismus is to put a patch on the stronger eye, which then forces the weaker eye to become stronger.[5] For an eyepatch to be effective at correcting the problem, however, it must be worn whenever the child is awake, and it takes a period of weeks or months for the affected eye to become stronger. Wearing the eye patch for an hour a day for a few weeks at a time would not be sufficient to correct the type of strabismus exhibited by A.H. Dr. DeJong stated that, if A.H. had worn an eyepatch at an earlier age, it clearly had not corrected the problem, and intervention was needed "as soon as possible."[6]

In Dr. DeJong's opinion, appellant's apparent failure to follow up with the recommended testing to rule out bone disease when A.H. was ten months-old was neglect:

> [A.H.'s] bones are not normal when I saw him at three years six months of age. He did have a normal Vitamin D level that particular day, but his bones do not appear normal at that time. He did not have normal appearing bones

of vitamin D. A.H. was seen by Dr. DeJong two weeks after he was removed from appellant's home and put into state care.

[5] Dr. DeJong stated that patching is not always successful in correcting the problem, at which point other treatments, such as specialized eyeglasses or surgery may be required.

[6] A photograph of A.H. wearing an eye patch at an earlier age was admitted into evidence.

> at ten months of age, and the doctors wanted to do specific testing that would allow them to make a diagnosis and give appropriate treatment for that. And since that testing was apparently not done, the doctors were unable to give a specific increase dose of Vitamin D, which is what they actually expected to have found with that testing. So from that perspective, there was neglect of following up on the medical care of a child who appeared to have bone disease, osteopenia, bones brittle enough to get fractured at that age, and yet the steps needed to make the appropriate diagnosis and make the appropriate treatment apparently were not done.

Dr. DeJong also stated that the untreated strabismus was a form of medical neglect.

Appellant then testified on her own behalf. She stated that, when A.H. was seen for the fractured femur at 10 months of age, she was told by the orthopedic doctor that A.H. "probably has some type of Vitamin D deficiency, and they wanted to follow up to see if that was the case." The doctor told her that A.H. needed to get more Vitamin D, and that treatment consisted of "Vitamin D and calcium and diet changes." Appellant then began to give A.H. calcium and Vitamin D supplements, in addition to a multivitamin supplement that he had been taking since he was an infant. Appellant did not follow up with a medical provider regarding A.H.'s condition after that because "the doctor expressed that . . . it wasn't a serious matter and it's treatable with Vitamin D and calcium."

Appellant first noticed that something was wrong with A.H.'s eye at birth. The pediatrician said that it could be due to his premature birth and told her to monitor it. When A.H. was 15 months old, his eye began to wander. The condition was not diagnosed by a physician, but appellant "look[ed] into" "recommendations" that "stressed the fact that the focusing is what causes the correction." Appellant stated that they "patched the eye" when A.H. was "doing things where he would have to focus," such as coloring or watching

television. She stated that, "because he was so young and un-tolerable [sic], we picked certain times to patch it." The time period varied from day to day "based on how much he would tolerate it." The eyepatch treatment was discontinued when A.H. was 21 or 22 months old because his eye no longer wandered and had "corrected itself."

With respect to N.H., appellant first noticed the curling of N.H.'s feet after her first birthday. Appellant bought N.H. "hard-bottomed shoes, in the hopes that it would help flatten her feet." Appellant researched the cause of the condition, and learned that it "was a result of not having [a] proper arch." Appellant then bought "corrective shoes [that] were supposed to help with that condition." Appellant stated that she was planning to consult a doctor about the condition if N.H. was not walking better by the time she was two years old.

Appellant noticed that N.H.'s legs were bent, and that she had a limp, but she attributed it to N.H. "learning how to walk." Appellant was not aware that N.H.'s stomach protruded abnormally, but "just thought that she was full all the time." Appellant noticed that both of N.H.'s wrists appeared swollen when she was four or five months old, but she did not think medical attention was necessary because "it presented so early," and "it did not seem to cause her discomfort or anything." Appellant thought N.H.'s swollen wrists might be a hereditary attribute because appellant's husband "has kind of the same bony protrusion."

Appellant described N.H. as a "picky eater," stating that she had a hard time trying to determine which foods N.H would eat. If N.H. did not eat what was offered, other

choices were offered. Appellant never allowed N.H. to go without eating something. Appellant felt that N.H was underweight, but she did not attribute this to a lack of food. Appellant "just kind of thought [N.H.] just was petite," because appellant herself was a petite baby.

Appellant was cross-examined about an article that had been posted on her Facebook page on January 12, 2016, the day before the children were taken from the home, entitled "Vitamin D Supplements Are Not Effective and Could be Dangerous Studies Find." Appellant stated that she could have posted the article, but she denied posting the article on that date. Appellant stated that she felt that "some forms of Vitamin D … can be dangerous."[7]

Additional facts will be discussed as necessary in the discussion that follows.

DISCUSSION

I.

Evidence of Public Assistance

Appellant's first contention deals with the admission of evidence that she received public assistance. Ms. Berkowich testified that, during the course of any investigation, she compiles records of safety assessments, as well as information regarding benefits that the

[7] The court subsequently stated that it would not allow "any reference to" the article unless it could be authenticated. None of the preceding testimony regarding the title of the article and that it was posted on appellant's Facebook page, however, was stricken from evidence.

family receives. Defense counsel objected to the admission of such records, stating as follows:

> My objection to these records is twofold. … for one I don't think they're relevant. Apparently all these statistics are jargon, which I'm sure Ms. Berkowich can interpret, show that the family was receiving food stamps, show that the family was [ ] receiving electrical assistance. And I don't see how that's relevant to the case.

After a discussion on relevancy, defense counsel stated that his second objection was "hearsay authentication." The court overruled the objection, stating that the records were admissible "for the sole purpose of indicating [that] on these dates [appellant] received these benefits."

Ms. Berkowich then testified that, according to the records she received, appellant received "electrical assistance, food stamps, and medical assistance." She received food stamps between May 2012 and February 2016, in amounts ranging from $200 to $826 per month, with the "majority of the amounts" being $700 to $900.[8] Appellant's family was covered by state insurance starting in 2012 and ending in 2015, at which time the family received private insurance. The family also received $1000 toward their electric bill in June 2014. Defense counsel did not object to this testimony.

Appellant contends that the court erred in admitting the evidence that she received public assistance. She asserts that she never argued an inability to provide for her children as a defense to the charge of neglect, instead asserting that the children were "well cared

[8] Ms. Berkowich stated that "obviously . . . [the amount] increased as more children were added" to the family.

for," and any deficiencies in the children's diet were due not to neglect but to her "entirely reasonable decision to eat naturally and organically." Under these circumstances, appellant contends that the evidence was irrelevant and improperly admitted. Appellant further contends that the evidence was "overly prejudicial" because it "improperly portrayed [her] as a "free-loading 'welfare queen'" and a "cruel and selfishly manipulative mother who, despite receiving thousands and thousands of dollars in assistance from the state, would not feed her children."

With respect to relevancy, the State asserts that "the trial court properly exercised its discretion in admitting evidence in the State's case-in-chief that [appellant's] failure to provide for her children was not due to a lack of financial resources." It argues that evidence that appellant had the means to provide proper nutrition and medical care for her children was relevant to prove the intent element of the crime of neglect of a minor, as well as the "willful" element of the crime of rendering a child in need of assistance. It further asserts that, given the language of the statute, "[d]isproof of inability-to-provide is consequently an element of child neglect, which the State must establish in its case-in-chief." With respect to the argument that the evidence was overly prejudicial, the State asserts that this argument is not preserved for review because it was not raised below.

Evidence is admissible if it is relevant, that is, if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401; 5-402. Relevant evidence may be excluded, however, if "its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5–403.

"'[T]rial judges do not have discretion to admit irrelevant evidence.'" *Fuentes v. State*, 454 Md. 296, 325 (2017) (quoting *State v. Simms*, 420 Md. 705, 724 (2011)). "'[T]he determination of whether evidence is relevant is a matter of law, to be reviewed *de novo* by an appellate court.'" *Id.* (quoting *DeLeon v. State*, 407 Md. 16, 20 (2008)). A trial court's weighing of the probative value of the evidence against its harmful effects, however, is subject to the more deferential abuse of discretion standard. *Id.* at 326, n. 13.

We begin with the issue whether the evidence regarding benefits was relevant.[9] Appellant was charged with neglect of a minor pursuant to Section 3-602.1 of the Criminal Law Article ("CR"), Maryland Code (2012 Repl. Vol.), which states: "A parent, family member, household member, or other person who has permanent or temporary care or

[9] We note that, although defense counsel objected to the admission of the records of benefits that appellant received, counsel did not object to the subsequent testimony from Ms. Berkowich regarding the contents of the records. Under these circumstances, this contention arguably is not preserved for appellate review. *See Fone v. State*, 233 Md. App. 88, 113 (2017) ("'to preserve an objection, a party must either object each time a question concerning the [matter is] posed or ... request a continuing objection to the entire line of questioning.'") (quoting *Brown v. State*, 90 Md. App. 220, 225 (1992)) (additional citations and internal quotation marks omitted); *Ridgeway v. State*, 140 Md. App. 49, 66 (2001) ("'when an appellant makes a timely objection, but fails to object at subsequent points in the proceedings, an objection is deemed waived.'") (quoting *Snyder v. State*, 104 Md. App. 533, 557 (1995)). The State, however, has not raised a preservation issue regarding appellant's argument that the records were not relevant, so we will consider the issue on the merits.

custody or responsibility for the supervision of a minor may not neglect the minor." CR § 3-602.1(b).

"Neglect" is defined in subsection (a)(5) of the statute as follows:

> (i) "Neglect" means 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.
>
> (ii) "Neglect" does not include the failure to provide necessary assistance and resources for the physical needs or mental health of a minor when the failure is due solely to a lack of financial resources or homelessness.

The parties raise an interesting issue whether, pursuant to § 3-602.1(a)(5), the lack of financial resources is an element of the offense of neglect that the State must prove in its case-in-chief, or whether it is an affirmative defense that the defendant must prove. It is an issue that we need not decide in this case, however, because the issue presented is solely whether the evidence of public assistance was relevant to the crime of neglect, and we conclude that, regardless of whether the existence of financial resources is an element of the offense or an affirmative defense, it was relevant to the intent element of the offense.[10]

[10] We note that the Court of Appeals has explained that, in determining whether a statutory exception to a crime is an affirmative defense, as opposed to an element of the offense that the State must negate, the Court looks to whether the exception is set out in the enacting clause defining the offense, or in a subsection subsequent to the enacting clause of the offense proscribed. *Mackall v. State*, 283 Md. 100, 110-11 (1978). The Court explained:

> [W]hen an exception is descriptive of the offense or so incorporated in the clause creating it as to make the exception a part of the offense, the State

As indicated, the State asserts that the evidence that appellant received financial assistance was relevant to the "intentional" element of criminal child neglect, i.e., that there was an "intentional failure to provide necessary assistance and resources for the physical needs … of a minor." It asserts that evidence that N.H. "was malnourished and had rickets despite the fact that [appellant had] resources to obtain food and medical care" bolstered its proof that appellant intentionally failed to provide necessary resources for N.H.'s physical health.

We agree with the State that the evidence was relevant on the issue of intent, i.e., whether appellant intentionally failed to provide adequate nutrition and medical care for N.H. and A.H. "'The question of one's state of mind, or his [or her] intention, at a particular

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> must negate the exception to prove its case. But, when an exception is not descriptive of the offense or so incorporated in the clause creating it as to make the exception a part of the offense, the exception must be interposed by the accused as an affirmative defense.

Id. *Accord Smith v. State*, 425 Md. 292, 296 (2012).

We further note that the legislative history of CR § 3-602.1 indicates that, although the sponsors of the bill initially contemplated that the lack of financial resources would be an affirmative defense, the language of the bill was changed to include, in the definition of "neglect," the exception for a failure to provide due to a lack of financial resources. *See* Senate Judicial Proceedings Committee, Floor Report, SB 178, 2011 General Assembly (Md. 2011) (stating that the original bill was amended to strike "language that would have made poverty an affirmative defense," and noting that it was "[u]nnecessary because of exception added to definition."); Hearing on S.B. 178 before the Sen. Jud. Proc. Comm., 2011 Reg. Sess. (Md. Mar. 1, 2011) (written testimony submitted to the Senate Judicial Proceedings Committee by then-Lieutenant Governor Anthony Brown stating that, "[b]y providing for this exclusion in the definitional section, we ensure that the cases that do not belong in the criminal justice system are never brought.").

time is one of fact, and is subjective in nature.'" *State v. Martin*, 329 Md. 351, 363 (1993) (quoting *Taylor v. State*, 238 Md. 424, 433 (1965)). And, "[g]iven the subjective nature of intent, the trier of fact may consider the facts and circumstances of the particular case when making an inference as to the defendant's intent." *State v. Manion*, 442 Md. 419, 434 (2015). Here, evidence that appellant had some means of providing proper nutrition and medical care to N.H. and A.H. was relevant to show an intentional failure to do so. *Cf. Dorsey v. State*, 356 Md. 324, 352 (1999) (in the context of a criminal contempt proceeding, although "ability to comply with a court order [to pay child support] at the time of the alleged criminal contempt is not directly an element of the offense, evidence of an ability to comply, or evidence of a defendant's conduct purposefully rendering himself unable to comply, may, depending on the circumstances, give rise to a legitimate inference that the defendant acted with the requisite willfulness and knowledge); *State v. Erpelding*, 874 N.W.2d 265, 277 (Neb. 2015) (holding that father's ability to pay child support was relevant to question of whether he intentionally failed to do so.) The circuit court did not err in determining that the evidence of financial benefits was relevant.[11]

Appellant next claims that, even if the evidence was relevant, the court abused its discretion in admitting it because the probative value of the evidence was outweighed by the danger of unfair prejudice. As the State points out, however, this argument was not

[11] Given this determination, we need not address whether the evidence also was relevant to the charge of rendering a child in need of assistance.

raised below.[12] Under these circumstances, it is not preserved for appellant review. *See Mines v. State*, 208 Md. App. 280, 291 (2012) (objection to testimony on grounds of relevance alone did not preserve for appellate review a claim that the testimony was prejudicial), *cert. denied*, 430 Md. 346 (2013).

Even if the issue was preserved, we would conclude that it is without merit. The circuit court admitted the evidence solely for the purpose of establishing appellant's receipt of financial assistance. We see no support in the record for appellant's claims that the State used the evidence to "suggest[] that the family exploited the birth of each new child as a reason to seek expanded benefits from the government," nor do we agree with appellant's claim that the "only possible inference" to be drawn from the evidence was that appellant was a "free-loading 'welfare queen.'" Indeed, the prosecutor did not even mention in closing argument that appellant received public assistance, stating only that the photographs showed that there was food in the home, yet N.H. was "starved." The circuit court did not err or abuse its discretion in admitting the evidence that appellant had received food stamps and other benefits.

II.

Sufficiency of the Evidence

Appellant's next contention is that the evidence was insufficient to support her conviction of child neglect of A.H. In particular, she asserts that the evidence was

[12] As indicated, *supra*, defense counsel stated that he objected to the evidence on two grounds: (1) "I don't think they're relevant"; and (2) "hearsay authentication."

insufficient to show that she "intentionally failed to provide for" A.H. With respect to A.H.'s stray eye, she asserts that she "patched A.H.'s eye pursuant to the doctor's recommendation," and "the fact that [A.H.'s] prescribed treatment had not yet worked was insufficient to demonstrate that [she] was providing inadequate care."[13] With respect to A.H.'s low bone density, she asserts that, upon learning that A.H.'s fractured leg may have been caused by vitamin deficiencies, she gave him vitamin supplements, and by the time Dr. DeJong examined A.H., his condition had improved.

The State contends that, when the evidence is viewed, as it should be, in the light most favorable to the State, it was sufficient to support the appellant's conviction of neglect. It asserts that the jury properly could have found appellant guilty of neglect on either the evidence relating to A.H.'s strabismus or the evidence relating to his osteopenia. We agree with the State.

As we have stated, "the often repeated test for sufficiency of the evidence is, '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.'" *Jones v. State*, 213 Md. App. 483, 505 (2013) (quoting *Bordley v. State*, 205 Md. App. 692, 716 (2012) (in turn quoting *Jackson v. Virginia*, 443 US. 307, 319 (1979)). The issue is not whether this Court believes that appellant is guilty, but

[13] As the State points out, there is no evidence in the record that appellant applied a patch to A.H.'s eye pursuant to a doctor's recommendation. Appellant stated that the condition was never diagnosed by a physician, but when she noticed something wrong with A.H.'s eye at birth, the pediatrician told her to "keep an eye on it."

whether the jury could determine that appellant was guilty beyond a reasonable doubt. *Moye v. State*, 369 Md. 2, 12-13 (2012).

In evaluating evidentiary sufficiency, we "defer[] to the 'unique opportunity' of the fact-finder to 'view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses.'" *Jones*, 213 Md. App. at 505 (quoting *Bordley*, 205 Md. App. at 717). We do not "second-guess any reasonable inferences drawn by the fact-finder," nor do we "reweigh the fact-finder's resolution of conflicting evidence." *Id.* Moreover, we do not consider evidence tending to support the defense theory of the case, as exculpatory inferences are not part of the version of the evidence most favorable to the State. *Cerrato-Molina v. State*, 223 Md. App. 329, 351, *cert. denied*, 445 Md. 5 (2015).

To convict appellant of neglect of A.H., the State was required to prove that appellant "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). With respect to A.H.'s strabismus, appellant stated that she was aware that there was "something wrong" with A.H.'s eye when he was first born, and she noticed that his eye started to wander when he was 15 months old. When A.H. was taken into care at age three, the condition had not been corrected. Ms. Berkowich observed that A.H.'s eye "would drift really severely to one side, and then it would drift back." The State's expert witness, Dr. DeJong, testified that strabismus in an infant requires early intervention, and if not taken care of "very quickly,"

it may lead to blindness. He stated that A.H. had "diminished vision" in the affected eye, and that intervention was needed "as soon as possible." Dr. DeJong testified that, to treat strabismus, the stronger eye must be patched every day for weeks or months. He stated that A.H.'s strabismus had not been effectively treated, which, in his opinion, was a form of medical neglect.

Appellant testified that she treated A.H. with the patch only at "certain times" of the day, and she stopped treatment at age 21-22 months. This testimony, along with Ms. Berkowich's testimony and a photograph clearly showing A.H. with a lazy eye at three-and-a-half years old, showed that appellant had stopped treatment, despite obvious signs that something was wrong with A.H.'s eye. The evidence was sufficient for a jury to find that appellant intentionally neglected to provide A.H. with the necessary assistance and resources for his needs.

With respect to A.H.'s osteopenia, prior x-rays, taken when A.H. was treated for a broken femur at 10 months old, showed signs that A.H. had low bone density. Appellant testified that the treating doctors suspected a Vitamin D deficiency and "wanted to follow up to see if that was the case." Dr. DeJong explained that osteopenia causes the bones to become brittle, and that fractured bones are more common in children with osteopenia. Although A.H.'s osteopenia had improved at the time that Dr. DeJong saw A.H., the fact that A.H. was still osteopenic at three years old suggested to Dr. DeJong that "something was not quite right, either in terms of nutrition or Vitamin D sufficiency." In his opinion, given the fact that, at 10 months old, A.H. had "bones brittle enough to get fractured,"

appellant's failure to follow up on medical recommendations for testing to diagnose the problem and determine appropriate treatment was neglect.

In sum, the State produced evidence that appellant was aware of, but failed to provide adequate medical treatment for, conditions that could result in blindness and broken bones. Based on this evidence, the jury could find, beyond a reasonable doubt, that appellant intentionally failed to provide necessary resources and assistance for A.H.'s physical health, and that failure created a substantial risk of harm.

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