Circuit Court for Baltimore City
Case No. 116344006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2849

September Term, 2018

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JORGE A. FUENTES

v.

STATE OF MARYLAND

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Fader, C.J.,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Eyler, James R., J.

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Filed: November 21, 2019

Appellant, Jorge A. Fuentes, was convicted by a jury sitting in the Circuit Court for Baltimore City of sexual abuse of a minor. The circuit court sentenced him to twenty-five years' incarceration. Appellant timely appealed and presents the following questions for our review:

1. Is the evidence insufficient to sustain the conviction?

2. Did the trial court err by permitting improper closing argument?

We answer both questions in the negative and shall affirm.

## BACKGROUND[1]

Appellant and the victim, Y., lived across the street from one another in Brooklyn, Maryland. The former resided with his wife, Carla, while the latter resided with her mother ("Mother"). Appellant's home doubled as a daycare center which several neighborhood children attended.

On October 25, 2013, Mother gave birth to another child, Y.'s sister. When Mother returned home that same day, Carla offered to babysit for her. Mother accepted Carla's offer. Thereafter, Carla routinely babysat then four-year-old Y. in the afternoon and was responsible for transporting her to and from school.[2] Though appellant worked during the day, he and Y. were both present at appellant's residence in the afternoon. When it was

[1] We present the facts adduced at trial in the light most favorable to the State. *See Twine v. State*, 395 Md. 539, 554 (2006) ("When an appellate court reviews the sufficiency of the evidence, the court views the evidence, and all inferences fairly deducible from the evidence, in a light most favorable to the State.").

[2] Though several children attended the daycare, none of those children were present while Carla babysat Y.

time for Y. to return home, she was either escorted to her house—by Carla or by someone else—or she returned on her own.

On the surface, the time that Y. spent at appellant's residence seemed pleasant. According to Mother, Carla and appellant "always gave [Y.] presents" and "spoiled her." Eventually, however, Y. told Mother that appellant had sexually abused her.

When appellant first sexually abused Y. they were alone in appellant's house.[3] Appellant asked Y. to assist him with something in the basement. When she entered the basement, appellant placed Y. on a sofa and undressed her. He proceeded to kiss, grope, and digitally penetrate her. He instructed Y. not to scream and not to report the abuse to Mother. During another encounter, appellant undressed and engaged in sexual intercourse with Y. on the basement sofa. On a third occasion, after ensuring that no one else was home, he brought Y. upstairs to his bedroom where he sodomized her. Certain that they were alone in the house, appellant left the door to his bedroom ajar while he did so. On yet another occasion, appellant showed Y. a pornographic video while in his living room.

On March 17, 2014, then five-year-old Y. informed Mother of appellant's sexual abuse. On that date, Carla had escorted Y. home and conversed with Mother. While Mother and Carla spoke, Y. used the restroom "and it really hurt." Upon leaving the

[3] At trial, Y., then nine years old, was asked, "Now, who else was in the house when this happened?" Y. answered, "No one. Mostly no one." The jury could properly have credited Y.'s initial answer and dismissed her second. *See Pryor v. State*, 195 Md. App. 311, 329 (2010) ("A fact-finder is free to believe part of a witness's testimony, disbelieve other parts of a witness's testimony, or to completely discount a witness's testimony"), *cert. denied*, 431 Md. 445 (2013).

restroom, Y. approached Mother and whispered in her ear "it really hurts … where I pee." Mother asked Y. what had happened, and Y. replied, "Jorge touched my private part." When Mother asked Carla for an explanation, Carla called appellant, who then went to Mother's house and knocked on the door. Mother answered and asked appellant, "What's going on[?]" Looking down at his hands, appellant replied, "[S]ister, I don't know.[4] Forgive me. I don't know what happened." When Mother responded that she "had to notify the authorities," appellant threatened her, intimating that if she did so he would harm her other children who lived in Honduras. Intimidated by appellant's threat, Mother did not immediately contact the police. During the course of the following week, Y. fell ill. On March 21, 2014, Mother and Y. consulted a physician. Y. informed the doctor that she had been sexually abused, and the police were called.

Additional facts will be recited as pertinent to our discussion of the issues.

## DISCUSSION

### I.

Maryland Code (2002, 2012 Repl. Vol.), § 3-602(b)(1) of the Criminal Law Article ("CR"), provides that sexual abuse of a minor occurs when "[a] parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor … cause[s] sexual abuse to the minor." "Sexual abuse" denotes "an act that involves

[4] At trial, Mother testified that appellant referred to her as "sister" because "at that time we were … brothers and sisters in Christ."

sexual molestation or exploitation of a minor, whether physical injuries are sustained or not." CR § 3-602(a)(4)(i).

Appellant neither disputes that the evidence was sufficient to sustain the jury's finding that he sexually abused Y., nor denies that Y. was a minor when he did so. He contends only that the evidence was insufficient to prove that he was a person who had "permanent or temporary care or custody or responsibility for the supervision" of Y. when the abuse occurred.

The standard for reviewing the legal sufficiency of evidence is "whether, after viewing the evidence 'in the light most favorable to [the State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *McKenzie v. State*, 407 Md. 120, 136 (2008) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (emphasis retained). "'Our concern is not with whether the trial court's verdict is in accord with what appears to us to be the weight of the evidence, but rather is only with whether the verdict[] w[as] supported with sufficient evidence[.]'" *Riley v. State*, 227 Md. App. 249, 255-56 (quoting *State v. Albrecht*, 336 Md. 475, 478 (1994)), *cert. denied*, 448 Md. 726 (2016). We, therefore, "give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [we] would have chosen a different reasonable inference." *Cox v. State*, 421 Md. 630, 657 (2011) (quotation marks and citation omitted). The determination of "whether a person has responsibility for the supervision of a minor is a question of fact for the jury to determine." *Harrison v. State*, 198 Md. App. 236, 243, *cert. denied*, 421 Md. 193 (2011). We shall, therefore, affirm

appellant's conviction if there was sufficient evidence—direct or circumstantial—from which the jury could have reasonably inferred beyond a reasonable doubt that appellant had responsibility for the supervision of Y. during any of the occasions on which he sexually abused her. *See Cooksey v. State*, 359 Md. 1, 23-24 (2000) (holding that sexual child abuse may be committed either by a single act or through a continuing course of conduct consisting of multiple acts).

In *Pope v. State*, 284 Md. 309, 323 (1979), the Court of Appeals distinguished between "[a] person who has … temporary care or custody … [of] a minor" and "[a] person who has … responsibility for the supervision of a minor." The Court explained that "[a] person who has … temporary care or custody … [of] a minor" is tantamount to a person standing *in loco parentis* to that child, *i.e.*, someone "'willing to assume all the obligations and to receive all the benefits associated with one standing as a natural parent to a child.'" *Id*. at 323 (quoting *Fuller v. Fuller*, 247 A.2d 767, 770 (D.C. 1968)). With respect to "responsibility for … supervision," the Court explained:

> "Responsibility" in its common and generally accepted meaning denotes "accountability," and "supervision" emphasizes broad authority to oversee with the powers of direction and decision. *See* American Heritage Dictionary of the English Language (1969); Webster's Third New International Dictionary (1968).

*Id*. The Court went on to explain how someone assumes supervisory responsibility of a minor:

> [R]esponsibility for supervision of a minor child may be obtained … upon the mutual consent, expressed or implied, by the one legally charged with the care of the child and by the one assuming the responsibility. In other words, a parent may not impose responsibility for the supervision of his or her minor

> child on a third person unless that person accepts the responsibility, and a third person may not assume such responsibility unless the parent grants it.

*Id*. at 323-24. The Court further explained that such responsibility, once assumed, terminates when a parent resumes responsibility for the minor child, either expressly or by conduct. Supervisory responsibility may not, however, be unilaterally relinquished by the person to whom it was granted. *Id*. at 324.

Appellant likens the facts in this case to those in *Pope v. State*. The abuse in that case occurred in the residence of Pope's grandparents, with whom she was living. Pope had agreed to allow a church acquaintance named Melissa and her three-month-old child to spend the night at the residence. Melissa suffered from intermittent delusional episodes throughout her stay with Pope. When Melissa was in the throes of such an episode, Pope "undertook the maternal duties." 284 Md. at 314. During a delusional episode the following day, Melissa squeezed the child and held the child by the neck with one hand, ultimately killing the child. Though Pope was present during the abuse and admitted to having known that Melissa was hurting her child, she did not intervene. Pope was charged with and convicted of child abuse.

The Court of Appeals held that though Pope's failure (i) to attempt to prevent the abuse and (ii) to seek medical assistance "constituted in themselves cruel and inhumane treatment within the meaning of the [child abuse] statute" the evidence was insufficient to prove that she had responsibility for the child's supervision at the time the abuse was inflicted. *Id*. at 328. In so holding, the Court reasoned:

> [T]he mother's acquiescence in Pope's conduct was not a grant of responsibility to Pope for the supervision of the child, nor was Pope's conduct an acceptance of such responsibility. "[Pope's] concern for the child [did] not convert to legal responsibility nor parental prerogatives."

*Id*. at 330 (quoting *Pope v. State*, 38 Md. App. 520, 538 (1978)).

At oral argument, appellant's counsel argued that *Pope* stands for the proposition that someone does not by their mere presence assume responsibility for the supervision of a minor. Appellant's presence at his and Carla's house, appellant contends, was therefore insufficient to prove that Mother had impliedly offered appellant supervisory responsibility for Y. or that appellant had accepted that responsibility.

The facts in *Pope* are distinguishable from those in this case. Whereas Melissa never relinquished exclusive responsibility for supervising her minor child, in this case, Mother unquestionably did so. Never having been offered supervisory responsibility for the child (either expressly or impliedly), Pope lacked the opportunity to accept such responsibility. In this case, by contrast, Mother did grant supervisory responsibility to Carla. The question is whether that responsibility extended by implication to appellant.

In determining whether Mother impliedly granted appellant supervisory responsibility of Y., *Ellis v. State*, 185 Md. App. 522 (2009), is instructive. The defendant in *Ellis* was employed as a teacher at the high school attended by S.S., the seventeen-year-old victim. Ellis and S.S. engaged in increasingly sexual conversations, culminating with Ellis's exposing himself to S.S. Ellis was charged with and convicted of, *inter alia*, sexual abuse of a minor.

On appeal, Ellis contended, *inter alia*, that he lacked supervisory responsibility for S.S. "because [she] 'was not a student in any of [his] classes, and had not been one since the previous academic year, nor was she a participant in any school activity he coached or advised.'" *Id*. at 548. In refuting Ellis's contention, we relied on *Anderson v. State*, 372 Md. 285, 295 (2002), which held that a parent entrusts a child "not to a particular teacher for a particular activity, but to the school as a whole for the entirety of the school day." In holding that Ellis was responsible for the supervision of S.S., we explained:

> [I]mplied mutual consent exists between a parent and school authorities whereby the school, and by extension all of the teachers, assumes the temporary supervision of the child for the entire school day, which does not end until the child leaves the school grounds in accordance with the express or implied permission of the parent[.]

185 Md. App. at 547.

On the facts of this case, a jury could find that Mother's express grant of supervisory responsibility to Carla extended by implication to the only other adult resident of the home in which she operated her daycare, to wit, appellant. Mother, of course, knew that (i) Carla's residence doubled as a daycare, (ii) appellant resided with her, and (iii) he was home when Carla babysat Y. Mother also testified that "[appellant] always went wherever Carla went." When describing the babysitting arrangement, moreover, Mother repeatedly referred to Carla and appellant collectively, testifying that "*they* would always give her gifts," "*they* always spoiled her," and "[Y.] always went and visited with *them*." (Emphasis added). Mother testified that Y. was "quite taken" with both Mother and appellant. Based on the evidence of Mother's knowledge and the testimony that she and appellant were

"brothers and sisters in Christ," a jury could find that Mother had some relationship with appellant. In addition, Mother testified that appellant loaned money to her husband. A jury could have inferred that Mother's grant of supervisory responsibility to Carla extended by implication to appellant.

Having found that Mother impliedly granted appellant responsibility for supervising Y., we must now determine whether appellant impliedly assumed that responsibility. We find *Newman v. State*, 65 Md. App. 85 (1985), *cert. denied*, 305 Md. 419 (1986), and *Harrison v. State*, 198 Md. App. 236, *cert. denied*, 421 Md. 193 (2011), instructive in that regard.

The victim in *Newman* was the twelve-year-old babysitter to the children of Newman's girlfriend, whom she babysat in Newman's home. Throughout the period that she babysat the children, Newman transported the victim between her house and his. On three occasions, Newman groped the victim as he drove her home. When on one occasion the victim spent the night at Newman's house, Newman forced her to undress and raped her.

On appeal to this Court, Newman contended, *inter alia*, that the evidence failed to prove that he had supervisory responsibility for the victim. At trial, the victim's mother testified that "appellant 'was to take care of [the victim] and [e]nsure her safety to and from the house.'" *Newman*, 65 Md. App. at 99. That testimony was sufficient to support a rational inference that mother had granted Newman supervisory responsibility. *Id.* In holding that Newman had accepted that responsibility, we emphasized that "appellant

transported the victim to and from her babysitting job, there was evidence that he paid her for babysitting on several occasions and that the babysitting was done in appellant's home." *Id*.

In *Harrison*, the defendant approached the victim's father and asked whether the thirteen-year-old victim, S.B., would be interested in performing landscaping work part-time on Harrison's property. Harrison told the father that "'he would watch over [S.B.]' and 'teach him how to use hand tools.'" *Harrison*, 198 Md. App. at 238. S.B. was interested and commenced the landscaping work. He stopped working for Harrison one year later because Harrison had repeatedly touched him inappropriately. In holding that Harrison had impliedly consented to assume responsibility for S.B.'s supervision, we reasoned:

> Appellant accepted the responsibility for supervision of S.B. when he called S.B. and offered him part-time work. Appellant repeatedly accepted the responsibility for supervision of S.B. each time he called S.B. to work. Mr. and Ms. B. resumed responsibility for the supervision of S.B. when S.B. was dropped off at the edge of appellant's property.

*Id*. at 244.

As illustrated by *Newman* and *Harrison*, in determining whether one's conduct constitutes a tacit acceptance of supervisory responsibility, we consider both (i) the extent to which that person affords the minor, *inter alia*, logistical and financial support and (ii)

the situs of the crime—specifically whether the crime occurred on the defendant's property.[5]

In this case, the jury could have reasonably inferred that appellant provided Y. with logistical support by escorting her to and from his house. Mother testified that "[s]ometimes Carla … would send her home with someone. Or sometimes she would bring her over herself." Particularly given Mother's testimony to the effect that appellant was perpetually with Carla in the afternoon, the jury could have reasonably inferred that appellant was the "someone" to whom Mother referred. Y testified that sometimes she and appellant were the only persons in Carla and appellant's house.

There was also evidence that appellant provided Y. with financial support. Mother testified that appellant and Carla "always gave her presents." Later during her testimony, Mother repeated, "[T]hey would always give her gifts, dresses. They always spoiled her."

A jury could have reasonably inferred from these facts that appellant impliedly accepted responsibility for the supervision of Y.

**II.**

Appellant also asserts that "the trial court erred in permitting improper closing argument," contending that during its closing argument the State impermissibly vouched for the credibility of Y.'s testimony. The State responds that the remark at issue was properly limited to evidence adduced at trial and reasonable inferences drawn therefrom.

[5] Per the Court of Appeals's opinion in *Pope*, this latter factor is by no means dispositive. It is, however, nevertheless germane to our analysis.

The closing argument at issue is as follows:

> [Y.'s] statements yesterday to you are not inconsistent with what she told … the forensic interviewer, in April of 2014. Or when she was interviewed again in September of 2015, because the State's Attorney's Office needed more information to decide whether to move forward.

Defense counsel objected. The court overruled that objection, ruling that the State was properly commenting on the evidence and reasonable inferences drawn therefrom. The court reasoned:

> There was cross from [the defense] about the timing of the mother as to when [the abuse] was reported. And then in September her mother said she was contacted again to go back down … to be interviewed again, and everything had to be interviewed again ….

Attorneys generally enjoy "wide latitude in presenting closing summation to the jury and may make any comment that is warranted by the evidence or inferences reasonably drawn therefrom." *Grandison v.* State, 341 Md. 175, 224 (1995) (citations and quotation marks omitted). Prosecutorial vouching—for or against—the credibility of a witness, however, impermissibly infringes upon a defendant's right to a fair trial. *Sivells v. State*, 196 Md. App. 254, 277 (2010), *cert. granted*, 418 Md. 397, *and cert. dismissed*, 421 Md. 659 (2011). As the Court of Appeals explained in *Spain v. State*, 386 Md. 145, 153 (2005), "vouching typically occurs when a prosecutor [1.] 'place[s] the prestige of the government behind a witness through personal assurances of the witness's veracity ... or [2.] suggest[s] that information not presented to the jury supports the witness's testimony.'" (Citation omitted). The first type of vouching risks "'induc[ing] the jury to trust the Government's judgment rather than its own view of the evidence,'" while the second type "'jeopardize[s]

the defendant's right to be tried solely on the basis of the evidence presented to the jury[.]'" *Id*. at 154 (quoting *United States v. Young*, 470 U.S. 1, 18-19 (1985)).

Appellant claims that the remark at issue "carried the imprimatur of the State as the investigating body and therefore bolstered the child's credibility." We disagree. The State's remark was neither a statement of the prosecutor's personal opinion, nor an assessment of Y.'s credibility. It neither indicated that the State had extrajudicial knowledge of appellant's guilt, nor suggested that the jury should convict based on the State's decision to prosecute. The remark was properly limited to facts in evidence and reasonable inferences drawn therefrom.

At trial, Detective Lakiea Jones of the Baltimore City Police Child Abuse Unit testified to her participation in the criminal investigation of appellant. She testified that she observed the initial forensic interview of Y. conducted by the Baltimore City Child Abuse Center on April 2, 2014. At the request of the State's Attorney's Office, the Baltimore Child Abuse Center conducted a second forensic interview of Y. on September 29, 2015. That interview was conducted, Detective Jones testified, in order "to gather more details in reference to the incident." Upon the completion of that interview, Detective Jones "was authorized to obtain a warrant."

Mother likewise provided testimony regarding the two forensic interviews. She explained that the second interview had been conducted because "in those days my little girl couldn't (indiscernible) quite well. And they wanted to compare now when she

(indiscernible)." During that second interview, Mother testified, Y. "repeated again what had happened."

As the State rightly concludes, based on this testimony, the jury could have reasonably inferred that "the second interview was conducted 'because the State's Attorney's Office needed more information to decide whether to move forward.'"

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.**