Circuit Court for Montgomery County
Case No. 136025C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 73

September Term, 2020

CARLOS ALBERTO VILLALOBOS

v.

STATE OF MARYLAND

Graeff,
Berger,
Ripken,

JJ.

Opinion by Graeff, J.

Filed: April 21, 2021

*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.

Appellant, Carlos Alberto Villalobos, was convicted by a jury in the Circuit Court for Montgomery County of sexual abuse of a minor pursuant to Md. Code Ann., Crim. Law ("CR") § 3-602(b) (Repl. Vol. 2012), and third-degree sexual offense of K.C., his wife's teenage granddaughter. The court sentenced appellant to 10 years, all but 18 months suspended, on the conviction of sexual abuse of a minor, and 5 years, all suspended, on the conviction for third-degree sex offense.

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

1. Was the evidence insufficient to sustain appellant's conviction for sexual abuse of a minor pursuant CR § 3-602(b)?

2. Was the evidence insufficient to sustain both convictions because the State failed to prove territorial jurisdiction?

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

FACTUAL AND PROCEDURAL BACKGROUND

In May 2019, when K.C. was 14 years old, she disclosed to a medical professional that she had been abused by appellant, her grandmother's husband, at her grandmother's home when she was between the ages of five and nine. On June 4, 2019, K.C. was interviewed by a police officer and a social worker with Montgomery County Child Protective Services.

On July 18, 2019, appellant was charged with sexual abuse of a minor pursuant to CR § 3-602(b), third-degree sex offense, and other sexual offenses. As relevant to the issues raised on appeal, the indictment stated that "on or about and between August 25,

2010, and August 24, 2014," appellant, "a person who ha[d] temporary care and custody and responsibility for the supervision of K.C.," caused sexual abuse to K.C. in Montgomery County.

Trial commenced on November 18, 2019. K.C., who was then 15 years old, testified that, when she was younger, her grandmother would babysit her while her mother was at work. When she was approximately five years old, she was watching television in the bedroom at her grandmother's home in Montgomery County, and appellant came into the room and began touching her chest over her clothing and then proceeded to put his fingers inside her vagina. Her grandmother was in the kitchen at the time. K.C. testified that appellant touched her in this manner more than once at her grandmother's house, but she did not recall how many times, and the incident in the bedroom was the only time that she could specifically recall. She stated that the last time the abuse occurred was "before [she] went to middle school."

When asked how often she was left alone with appellant at her grandmother's house, K.C. testified that she and appellant were left alone only "for a split second." Her grandmother sometimes would leave to go pick up food "across the street," but those were the only instances when she and appellant were home alone together. On cross-examination, defense counsel asked if K.C. had told the police during the June 2019 interview that appellant would sometimes babysit her while her grandmother went to work. K.C. did not recall this statement, and she denied telling the police that her grandmother was at work at the time of the abuse.

K.C. also testified that she and appellant did not speak very frequently or have "substantive conversations," in part because appellant primarily spoke Spanish and only some English. She did not talk to him about school, her friends, or her hobbies. She stated that appellant was "sometimes" at the home while she was there.

K.C. testified that her grandmother currently lived in Gaithersburg, but during the period in question, her grandmother "moved around." She stated, however, that she knew that the first incident in the bedroom occurred at her grandmother's house in Montgomery County because her grandmother "always lived in Montgomery County."[1]

J.P., K.C.'s mother, testified that her mother—K.C.'s grandmother—sporadically babysat for K.C. when K.C. was younger. She would babysit during the day while K.C.'s mother was at work or sometimes overnight when she was out of town. In 2010, her mother watched K.C. for approximately one week while J.P. traveled to Japan. It was her understanding that her mother was in charge of babysitting K.C., and to her knowledge, appellant was never left alone with K.C.

J.P.'s mother watched K.C. at a few different homes over the years, including two locations in Montgomery County and another in Prince George's County, but she could not recall the exact timeline. Appellant, whom she referred to as her stepdad, was living with her mother during this period, but he typically was asleep or at work when she dropped

[1] As noted *infra*, her mother and grandmother testified that there was a brief period when her grandmother lived in Prince George's County.

off K.C. J.P.'s mother and appellant lived with her and K.C. for approximately one month when K.C. was eight years old.

K.C. never disclosed to J.P. any inappropriate behavior by appellant, and K.C. seemed "normal and happy" around him during the time period in question. K.C. and appellant did not have a very close relationship, and J.P. could not recall them ever engaging in a "substantive conversation about [K.C.'s] life." Appellant, however, recently had been invited to K.C.'s quinceañera.[2]

K.C.'s grandmother, S.C., testified that she had been dating and living with appellant for 12 years, and they were married in 2015. She babysat K.C. approximately once a month during the period in question, usually on weekends because she worked full-time as a pharmacy technician during the week. Because appellant's first language was Spanish, and J.P. only spoke "a little" Spanish, she had never seen appellant and her daughter have a conversation aside from greeting one another. K.C. also knew only "a few words" in Spanish.

S.C. testified that she had never left K.C. alone with appellant while she was babysitting, and K.C. had never acted afraid of appellant. Specifically, she denied that appellant and K.C. had ever been alone together in the bedroom. S.C. testified that appellant was present only 20% of the time that she watched K.C. because he worked

[2] A quinceañera is "a celebration of a girl's fifteenth birthday that is traditionally observed in Latin American cultures to mark her transition to adulthood." *Merriam-Webster Online Dictionary*, available at https://www.merriam-webster.com/dictionary/quincea%C3%B1era [https://perma.cc/6RPW-XJVZ] (last visited Apr. 19, 2021).

nights. In addition to watching K.C. at her home in Montgomery County, and while she briefly lived with J.P., S.C. also babysat K.C. when she lived in Prince George's County for approximately nine months in 2011 to 2012.

J.P.'s former husband, whom K.C. considered to be her father, testified that he picked up K.C. at S.C.'s house approximately once a month during the period in question. Appellant was present approximately half of the time. When asked if he had seen K.C. interact with appellant, he responded: "Very vague, you know maybe a joke here and there. I can't remember, I just remember them both laughing about something."

Brittany Colandreo, a social worker with Montgomery County Child Protective Services, testified that she interviewed K.C. in June 2019 following the allegations of abuse. K.C. told her that the abuse occurred while her grandmother was at work, and appellant was babysitting her. She said that the abuse occurred only at one of her grandmother's homes.

DISCUSSION

I.

Appellant's first contention is that the evidence was insufficient to support his conviction of sexual abuse of a minor. CR § 3-602(b) provides:

> (1) A parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a minor may not cause sexual abuse to the minor.

> (2) A household member or family member may not cause sexual abuse to a minor.[3]

To secure a conviction for sexual abuse of a minor pursuant to CR § 3-602, the State must prove "(1) that the defendant is a parent, family or household member, or had care, custody, or responsibility for the victim's supervision; (2) that the victim was a minor at the time; and (3) that the defendant sexually molested or exploited the victim by means of a specific act." *Scriber v. State*, 236 Md. App. 332, 343 (2018) (quoting *Schmitt v. State*, 210 Md. App. 488, 496, *cert. denied*, 432 Md. 470 (2013)). Appellant's challenge on appeal involves the first element. He asserts that he was not within the class of persons subject to CR § 3-602(b).

To address appellant's claim, we must first set forth the unique procedural posture of this case. At the conclusion of the State's case and the defense motion for judgment of acquittal, the court and counsel briefly discussed jury instructions. The prosecutor advised that it was proceeding under the theory that appellant was a family member.

At the conclusion of all the evidence, the court instructed the jury as follows:

> Child sexual abuse is the sexual molestation or exploitation of a child under 18 years of age caused by a family member of a child. In order to convict the defendant of child sex abuse then the State must prove three things. So there's three elements to that offense.
>
> First, that the defendant sexually abused [K.C.] by unlawful penetration which is a defined term. I'll define that for you in a moment,

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[3] Md. Code Ann., Crim. Law ("CR") § 3-601(a)(3)–(4) (Repl. Vol. 2012), defines a "family member" as "a relative of a minor by blood, adoption, or marriage" and a "household member" as "a person who lives with or is a regular presence in a home of a minor at the time of the alleged abuse."

> fellatio, sexual contact of the breasts or sexual exploitation and I'll define sexual exploitation for you in just a moment. That's the first element.
>
> The second, that at the time of the abuse [K.C.] was under 18 years of age and third, that at the time of the abuse the defendant was a family member[,] which again is a defined term, of [K.C.]

The court then instructed that the term "family member" meant a "relative of the child by blood, adoption or marriage." The court did not provide any definitions regarding the other categories of persons covered by CR § 3-602(b).

Before jury deliberations began, a juror sent a note to the court. The court read the jury note into the record, as follows:

> [I]n the definition of child sex abuse at the time the accused was a family member defined by blood, adoption or marriage but wife/grandmother says only married for four years so is domestic partner covered? Is there a marriage license and Maryland state law on domestic partner?

Following a brief recess, the court concluded, and the State agreed, that because S.C. and appellant were not married until 2015, after the alleged acts of abuse, appellant could not, as a matter of law, qualify as a family member.

The following then ensued:

> [PROSECUTOR]: And I think at that point argument, if we are renewing an argument, motion for judgment of acquittal[,] I would, I don't dispute that given the analysis that we've just had but I think there is some evidence that the jury could consider with regards to the other way it was charged in the indictment as to temporary care and custody. I mean the problem is that it wasn't read to them in the jury instruction.
>
> [DEFENSE COUNSEL]: I would, **if we were** having a motion for judgment of acquittal argument again[,] I would submit that the testimony from [K.C.] was she denied that he ever babysat her.

THE COURT: Well, what she called it, if in fact she was left at her mother's care, custody, sorry her grandmother's care and custody and if as she testified on at least one occasion the grandmother leaves and leaves her in the care, custody of her husband, whether domestic partner or by marriage, the jury could infer reasonably that she's there under the care, custody of the husband.

I don't think you would be entitled to judgment on that issue. The problem is in light of the State's election that argument hasn't been made. On the other hand, there wasn't a motion to this because nobody really actually even thought of it, it never occurred to anybody, myself included until the juror wrote this note.

I'll tell you what I am inclined to do and I'll do it if there's no objection, is I would in response to the question explain to the jurors that in light of, I mean they wrote the question or the juror wrote the question, answer the question and say basically it appears that he would not qualify as a family member and therefore they may not consider whether he is qualified as a family member but then offer a definition and then I've got to let you both reargue that limited issue as to whether he is or isn't a family member under the subdefinition. But then we've got to change the jury instruction.

* * *

. . . So I will explain to them that under the statute there is an alternative theory that would apply the statute to a person and then read the appropriate language is or that the statute also would apply to a person even though not a family member with permanent or temporary care, custody, responsibility for the supervision of a child and if so, then I'm going to amend the instructions to reflect that and delete the reference to family member and[,] in light of the fact that neither counsel argued this issue[,] I'm going to permit both counsel to argue that limited point. And I want to give you like five minutes each. And I frankly don't know what else to do.

[PROSECUTOR]: The State has no objection to that.

[DEFENSE COUNSEL]: I would request that we not re-open arguments. I would request that an answer be fashioned only in response to the question.

[PROSECUTOR]: I'm not opposed to that.

THE COURT: Okay. If that's what you want[,] then I'll give that.

(Emphasis added.) The court then confirmed that defense counsel "otherwise [was] agreeable with the modification," and counsel said: "Yes."

The court then reinstructed the jury as follows:

> THE COURT: So ladies and gentlemen, the note that was presented to me was actually brilliant and very complex.
>
> * * *
>
> [I]t was something that I hadn't even thought about but my attention having been drawn to this fact and it was uncontroverted that they had only been married for four years according to the uncontroverted testimony even though they had lived together as domestic partners until 2012, but I am persuaded based upon the use of the term marriage in the criminal statute that it would not extend to domestic partners.
>
> So, therefore, I've determined as a matter of law for purposes of that statute that defendant would not be a "family member" as I had previously given you that instruction and so that's one of the elements of the offense.
>
> However, there are alternative definitions of the persons to whom the statute applies that we hadn't used in light of the election to go by family member. So an alternative, by the words of the statute that statute [sic], the child abuse statute also applies to the following person and this would be the third element of that particular offense, child abuse sexual abuse and I've actually amended the instructions that were sent back with you to reflect this alternative definition.
>
> So it says that child sexual abuse is the sexual, it is sexual abuse, sexual molestation or exploitation of a child under 18 years of age caused by and then it says the changed definition, a person with permanent or temporary care, custody or responsibility for the supervision of the child. So we are striking family member.

Appellant does not challenge the revised instruction or the court's decision to allow the State to proceed on an alternative theory under CR § 3-602(b). Rather, he contends that the evidence was insufficient to sustain his conviction for sexual abuse of a minor as

a person with "permanent or temporary care or custody or responsibility for the supervision of a minor." Appellant argues that "permanent or temporary care or custody" requires an "in loco parentis" relationship, and he did not have a significant relationship with K.C. He asserts that "responsibility for the supervision" of the minor requires "mutual consent" between the legal parent and the caretaker, and there was no evidence to show that he and K.C.'s mother ever mutually agreed that he would have responsibility for supervision of the child.

The State contends that this claim is not preserved for this Court's review. In any event, it argues that the contention is without merit because the evidence was sufficient for a reasonable fact finder to conclude that appellant had "temporary care or custody or responsibility for the supervision" of K.C. It asserts that a reasonable jury could infer that J.P.'s consent for S.C. to watch K.C. implicitly extended to appellant, and appellant implicitly accepted that responsibility during the brief times when S.C. was not present.

We begin with the State's argument that his claim is not preserved for review. Maryland Rule 4-324(a) provides:

> (a) Generally. A defendant may move for judgment of acquittal on one or more counts, . . . at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence. The defendant shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment of acquittal shall be necessary. A defendant does not waive the right to make the motion by introducing evidence during the presentation of the State's case.
>
> *   *   *
>
> (c) **Effect of Denial**. A defendant who moves for judgment of acquittal at the close of evidence offered by the State may offer evidence in the event the

> motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the defendant withdraws the motion.

It is clear that, "[i]n a jury trial, the only way to raise and to preserve for appellate review the issue of the legal sufficiency of the evidence is to move for a judgment of acquittal on that ground." *Fraidin v. State*, 85 Md. App. 231, 244, *cert. denied*, 322 Md. 614 (1991). The defendant is "required to argue precisely the ways in which the evidence should be found wanting and the particular elements of the crime as to which the evidence is deficient." *Starr v. State*, 405 Md. 293, 303 (2008) (quoting *McIntyre v. State*, 168 Md. App. 504, 527–28 (2006)). "A defendant may not argue in the trial court that the evidence was insufficient for one reason, then urge a different reason for the insufficiency on appeal." *Id.* (quoting *McIntyre*, 168 Md. App. at 527–28). "A criminal defendant who moves for judgment of acquittal is required by Md. Rule 4-324(a) to 'state with particularity all reasons why the motion should be granted[,]' and is not entitled to appellate review of reasons stated for the first time on appeal." *Id.* at 302.

Here, defense counsel made a motion for judgment of acquittal at the close of the State's case. The reason asserted, however, was that the circuit court did not have jurisdiction because the State had not met its burden to show that the abuse occurred in Montgomery County. When the court asked whether counsel had any other motions, counsel replied: "With regards to the, all the specific []counts, the defense will submit on the motion." The court denied the motion.

At the close of all evidence, defense counsel stated: "I do renew my motion. I'll submit on the motion." The court asked if counsel adopted his prior argument, and counsel stated: "I adopt my prior arguments."

The record is clear that, at the time appellant made his motion for judgment of acquittal, he did not argue that the evidence was insufficient to show that he had the requisite status to be convicted under CR § 3-602(b), i.e., a parent, family or household member, "or other person with permanent or temporary care or custody or responsibility for the supervision of a minor."[4] The argument made on appeal clearly was not preserved by the motion for judgment of acquittal made below. Indeed, appellant did not even file a reply brief challenging the State's preservation argument, and counsel did not appear for oral argument, deciding instead to submit on its brief.

Although appellant has not raised the issue, we do note that there was a discussion including the words "motion for judgment of acquittal" after the jury raised the point that appellant was not a "family member" at the time of the abuse. Defense counsel stated that, "**if** we were having a motion for judgment of acquittal argument again[,] I would submit that the testimony from [K.C.] was she denied that he ever babysat her." (Emphasis added.) The time for such a motion, however, had passed, and counsel did not ask to renew his motion for judgment of acquittal. *Cf. Moore v.* State, 198 Md. App. 655, 709–10 (2011) (Upon request, court allowed counsel to renew his motion for judgment of acquittal after

[4] We note that appellant made his initial motion for judgment of acquittal prior to the time that the State advised the court that it was proceeding under the theory that appellant was a "family member."

beginning jury instructions.). Rather, counsel phrased his statement as a hypothetical, "if we were having a motion," and then, rather than asking to renew his motion, he agreed to the court giving revised instructions, and he asked that arguments not be reopened.

Under these circumstances, appellant's claim on appeal that the evidence was insufficient to prove that appellant was a person with temporary care/custody or responsibility for the supervision of K.C. is not preserved for this Court's review. Accordingly, we will not address the issue.

II.

Appellant's second contention is that the evidence was insufficient to show that the court had territorial jurisdiction to hear the case because the evidence did not show that the crime occurred in Montgomery County. The circuit court denied the motion, noting K.C.'s testimony that the first incident occurred at her grandmother's house in Montgomery County.

In assessing this claim, we note initially that the issue presented involves venue, not territorial jurisdiction. This Court has described territorial jurisdiction as follows:

> "Territorial jurisdiction describes the concept that only when an offense is committed within the boundaries of the court's jurisdictional geographic territory, which generally is within the boundaries of the respective states, may the case be tried in that state." *State v. Butler*, 353 Md. 67, 72, 724 A.2d 657 (1999). In Maryland, territorial jurisdiction is not an element of the offense for which the defendant is on trial, so as to require that it be proven in every case. *Id.* at 79 n.5, 724 A.2d 657. However, "when evidence exists that the crime may have been committed outside Maryland's territorial jurisdiction and a defendant disputes the territorial jurisdiction of the Maryland courts to try him or her, the issue of where the crime was committed is fact-dependent and thus for the trier of fact." *Id.* at 79, 724 A.2d 657.

Jones v. State, 172 Md. App. 444, 453–54 (2007). Territorial jurisdiction refers to the power of Maryland courts to hear criminal cases concerning offenses alleged to have occurred within state boundaries. *See West v. State*, 369 Md. 150, 153 (2002) (Maryland courts did not have territorial jurisdiction because the sexual conduct occurred in the District of Columbia.).

Venue, by contrast, "refers to the particular locality within a state that may try a criminal charge." *State v. Adams*, 406 Md. 240, 247 n.4 (2008), *overruled on other grounds*, *Unger v. State*, 427 Md. 383 (2012). *Accord McBurney v. State*, 280 Md. 21, 31 (1977) (Venue "is the place of trial, or where a criminal trial may properly occur."). In Maryland, unless otherwise fixed by statute, "[t]he proper venue of a crime is the county where it was committed." *Greco v. State*, 65 Md. App. 56, 65 (1985), *aff'd*, 307 Md. 470 (1986).

Although the State has the burden to prove proper venue, the "burden is initially upon the criminal defendant to raise the issue." *Smith v. State*, 116 Md. App. 43, 53–54, *cert. denied*, 347 Md. 254 (1997). The defendant also has the initial burden of production. *Id.* Accordingly, improper venue must be raised by motion before trial or it is waived. *Id.* at 53. If the defendant makes a proper objection and produces evidence to generate the issue, the State must prove venue by a preponderance of the evidence. *Id.* at 53–56.

Here, appellant did not raise the issue relating to the county where the abuse occurred prior to trial. He did not raise it until the motion for judgment of acquittal. Accordingly, the issue is waived.

Even if appellant's argument was preserved for our review, we would find it to be without merit. K.C. explicitly testified that the first incident, i.e., when appellant abused her in the bedroom when she was five years old, occurred at her grandmother's house in Montgomery County. As the trial court noted, K.C.'s testimony in this regard, coupled with the fact that S.C. lived in Prince George's County only for nine months out of the four-year period during which the abuse occurred, was sufficient for a jury to find that the crimes occurred in Montgomery County. Accordingly, Montgomery County was a proper venue, and to the extent the issue is properly before this Court, it is without merit.

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