Circuit Court for Prince George's County
Case No. JA170048

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 107

September Term, 2017

IN RE K. S.

Kehoe,
Berger,
Beachley,

JJ.

Opinion by Kehoe, J.

Filed: September 18, 2018

This is an appeal from a judgment of the Circuit Court for Prince George's County, sitting as a Juvenile Court, that found K. S. involved in (1) robbery with a dangerous weapon, (2) conspiracy to commit robbery with a dangerous weapon, (3) robbery, (4) conspiracy to commit robbery, (5) second-degree assault, and (6) theft of property with a value under $1,000. At a later disposition hearing, the court ordered appellant to be placed on probation with protective supervision for an indefinite period subject to certain conditions. Appellant presents two questions, which we have reworded:

1. Did the juvenile court properly admit the victim's out-of-court statements?
2. Was the evidence legally sufficient to find K.S. involved in all counts alleged in the petition?

We answer "yes" to both questions and affirm the circuit court's judgment.

Background

The State's petition alleged that, on the afternoon of January 17, 2017, K. S., acting in concert with two other juveniles, N. S. and D. B., robbed the victim ("J.") at knifepoint while J. was walking home from the Bowie Town Center Shopping Mall. J.'s backpack and his cell phone were stolen.

J. was twelve years old when he testified at the adjudicatory hearing. He stated that he understood the difference between a truth and a lie and the importance of telling the truth. He related that he used to go to school with appellant and met him in the first grade, but denied knowing N. S. He also said he used to be friends with D. B. He denied "hanging out" with appellant and D. B. on January 17th, but admitted that he was getting food by

himself in the shopping center's food court on that day. While he was at the food court, J. spoke with D. B. and saw appellant, who was standing near D. B. When asked if the appellant talked to him or encountered him at all, J. responded "no." When the prosecutor asked him if appellant "put his hands on [him] at all," he responded that he "[didn't] know" and "[didn't] remember." At that point, the prosecutor showed J. State's Exhibits 1 and 2 and asked him to read them and see if they "help[ed] [him] remember what happened."

State's Exhibit 1 is a police department "Statement of Victim/Witness/Suspect" form that contains, among other things, J.'s name and address, the date "01-17-17," and includes the following hand-written statement:

> I was walking home with three people. [One] named [D.B.] who had a [R]aiders hoodie, white shoes and sweat pants. One of them held me by my book bag[,] he had a grey hoodie on and red [T]imberlands. One of them pulled a knife, poked me, put it to my throat, green knife. He had on a red hoodie, a belt on. One with the [R]aiders hoodie is named [D. B.], gray hoodie is named M. [(M. is appellant's middle initial.)]

State's Exhibit 2 was a picture of K. S. on the left side and the following hand-written questions and answers on the right side:

> [Question:] Who is the person?
>
> [Answer:] M[.]
>
> [Question:] How do you know this person?
>
> [Answer:] Elementary School
>
> [Question:] What did this person do to you?
>
> [Answer:] Robbed me of my back pack and phone.

The statement is signed by J. and is dated January 17, 2017.

After reviewing the documents, the prosecutor asked J. if they helped him remember what happened between him and appellant on January 17th. J. responded that he could "barely read" the statements, but stated that they were in his handwriting and that his signature was on one of the documents. After reading the documents again, the prosecutor asked J. "what happened between you and [appellant] when you walked outside of the food court at the Bowie Town Center?" When J. gave no audible response (according to the transcript), the prosecutor asked him if he "remember[ed] and [he] just [didn't] want to answer?" In response, J. said he "[did] not want to participate and [he] would like to remain silent." Invoking Md. Rule 5-802.1(a), the prosecutor then moved to admit State's Exhibits 1 and 2 because J. was feigning memory loss and had testified that he had written each statement. The defense objected, arguing that the witness had not given any inconsistent testimony, and that it was "just a prior statement."[1]

Following the defense's objection, the court attempted to determine why J. was refusing to give further testimony. The exchange went as follows:

> THE COURT: All right. [J.], can you tell me why you don't want to say anything else?
>
> THE WITNESS: (No audible response.)

[1] There was a third basis for the objection, namely, that the two exhibits had not been disclosed in discovery. This issue was cleared up later in the proceeding, and appellant no longer argues that there was a discovery violation.

THE COURT: You don't have a response?

THE WITNESS: (No audible response).

THE COURT: Well, you started talking about what happened at the Bowie Town Center, right? So why did you just stop?

THE WITNESS: I would like to remain silent.

THE COURT: Are you worried about that you could get in trouble?

THE WITNESS: I would like to remain silent.

THE COURT: And who told you that you could remain silent?

THE WITNESS: I would like to remain silent.

THE COURT: Yeah. But I'm asking who told you, you could remain silent?

THE WITNESS: I would like to remain silent.

THE COURT: All right. Who did you speak to before you came in here? Before you answer that question, you know, you might be right, people do have a right to remain silent about things that could get them in trouble. Okay?

However, you still have to answer questions about things that can't get you in trouble. So, like, when I ask you who told you, who'd you talk to about the right to remain silent, that can't get you in trouble. So that you have to answer me. Do you understand?

THE WITNESS: I still don't have to answer you and I would still like to remain silent.

THE COURT: And who told you, you don't have to answer me?

THE WITNESS: I would like to remain silent.

THE COURT: All right. Who did you come with today? Because I'm going to find out what happened.

The State then informed the court that J. came to court that day with his stepfather, "E.", and the court called him to the stand. E. testified that J. learned about "the right to remain silent" because "he watches a lot of TV shows" and he has an attorney that "knows about the situation." E. then clarified that J. had not spoken to an attorney, but had overheard phone conversations between E. and E.'s attorney about "[b]usiness dealings." E. told the court that these conversations "could have" included discussions related to the right to remain silent, but he could not "really recall." The court asked E. why the "right to remain silent," a criminal matter, came up in the course of a conversation between E. and his lawyer about "business dealings." E. told the court he did not know. The court then concluded that "watching TV' must have been where he picked up on the right to remain silent, and E. responded "yes." The court then excused E.

The State argued for the admission of State's Exhibits 1 and 2 as prior inconsistent statements because J. was "feigning memory loss." The court replied that J. was "not feigning memory loss, he just doesn't want to talk," to which the prosecutor responded, "Yes. And I have my suspicions as to why that is and I think it has to do with [E.] and [E.'s] involvement in the events of the day, later that day." The prosecutor then added that J. did not have a Fifth Amendment right to remain silent because there was "nothing that he [could] say that would incriminate him in anything."

The court admitted Exhibits 1 and 2 as substantive evidence, explaining:

> So the Court finds that [J.], being a 12 year old, has been influenced, pressured or otherwise instructed about this right to remain silent that doesn't exist. If he were

> an adult, I would handle it in a different matter, but he's not an adult and I think there's a less intrusive way to deal with this and that's the statement.
>
> The statement doesn't have to be signed under penalties of perjury, it just has to be at some point that the proponent of the document acknowledged it, whether he or she signed it, whether he verbally said that's my statement, the fact is if he acknowledges that was his statement, then it can come in as substantive evidence.[2]

Defense counsel then requested an opportunity to cross-examine J. The court replied that, because J. refused to testify for the State, he could not testify for the defense. Defense counsel said that he understood but argued that the admission of the statements would "have a huge issue on the provision [sic] clause, because [he] wouldn't be able to verify what he said there."[3] The court responded:

> The State can also not be handcuffed by people . . . [who go] against our whole jurisprudence system, that someone can influence a witness not to testify and, therefore, prevent the State from even attempting to make a case. If that were to happen, our whole structure falls. And the rules allow it. So I'm not making an exception, that's the rule.
>
> There's a prior statement that he acknowledged, he acknowledged that that was his signature. He refuses to testify, it comes in.

The State then called D. B. as a witness. He testified that he was 12 years old and knew both J. and K.S. On January 17, 2017, D. B. was with appellant and N. S. at the food court

[2] Initially, the State also sought to enter a video and audio recording of J.'s interview by the police, but withdrew it because it was cumulative to the other two exhibits.

[3] Appellant notes in his brief that "he recalled making [an] argument about the confrontation clause."

at the Bowie Town Center, where they were talking about school. D. B. heard appellant and N. S. talk "about robbing [J.] and stuff. Although he did not remember "the whole conversation," he agreed to participate. D. B. also testified that he saw appellant with a knife. When asked what the knife looked like, he said "I don't exactly remember. I know one of them was gray, but I don't remember the color of the other one." He also said "it wasn't a kitchen knife. It was one that you buy from the store for protection and stuff." D. B. stated that he did not know why appellant wanted to rob J.

D. B. related that when he left the food court, he told appellant and N. S. that he was going home and was going to walk J. home. D. B. did not go all the way to J.'s home, but made it to a point where they could see the house and J. "could easily go" there. D. B. then "walked off" towards his own house without "see[ing] anything else." However, he explained that K. S. and N. S. "weren't too far behind." Although he did not see K. S. and N. S. initially approach J., he heard J. call his name. When D. B. turned around in response, K. S. and N. S. "had already run off and [J.] ran to his house." The defense then briefly cross-examined D. B.

The State rested its case after D. B.'s testimony. The court apparently reconsidered its refusal to allow defense counsel to cross-examine J., because it recalled J. as a witness, explaining that "he did testify about some things and the Defense has a right to cross examine him about the portion that he did testify about." The court asked J. if he was

"willing to answer questions about the portion [he had] talk[ed] about." J. answered, "Uh-uh." The dialogue went as followed:

> THE COURT: You don't want to say anything anymore?
>
> THE WITNESS: Uh-uh.
>
> THE COURT: All right. Counsel.
>
> [DEFENSE COUNSEL]: I'll waive the cross, Judge?
>
> THE COURT: I'm sorry?
>
> [DEFENSE COUNSEL]: I will waive the cross.
>
> THE COURT: All right.

Appellant did not present any evidence. Instead, counsel moved for a judgment of acquittal on all charges because there was not enough evidence to find appellant involved beyond a reasonable doubt. The parties then gave closing arguments, after which the court found that the State met its burden regarding all counts.

Analysis

1. The Court properly admitted J.'s out-of-court statements.

Appellant contends that the trial court committed reversible error by admitting State's Exhibits 1 and 2, which were J.'s out-of-court statements. First, Appellant argues that because J. was unavailable for cross examination, neither of the State's two exhibits fell within a firmly-rooted hearsay exception to allow for admissibility. Second, he points out that Exhibit 1 was not signed by J. and that, Exhibit 2, although bearing J.'s signature, had

no indicia of reliability. Third, K.S. argues that photo identification was impermissibly suggestive and unfairly prejudicial. Finally, K.S. claims that the statements were not given under oath or at a prior judicial proceeding. None of these contentions are persuasive.

Whether an out-of-court statement should be admitted is often a mixed question of law and fact. We review the trial court's legal reasoning *de novo*, and the court's fact-finding for plain error. *Gordon v. State*, 431 Md. 527, 538 (2013). We conclude that the court properly admitted Exhibits No. 1 and No. 2 under Md. Rule. 5-802.1(a) and (c).

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Hearsay evidence is inadmissible "except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes[.]" Md. Rule 5-802. The Court of Appeals has explained that Maryland Rule 5-802.1 provides a mechanism by which prior testimony, and in some instances, prior out-of-court statements, may be admitted as substantive evidence. *Tyler v. State*, 342 Md. 766, 775 (1996).

Maryland Rule 5.802.1 reads in pertinent part

> The following statements previously made by a witness who testifies at the trial or hearing and who is subject to cross-examination concerning the statement are not excluded by the hearsay rule:
>
> (a) A statement that is inconsistent with the declarant's testimony, if the statement was (1) given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition; (2) reduced to writing and was signed by the declarant; or (3) recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement; [and]

. . .

> (c) A statement that is one of identification of a person made after perceiving the person[.]

A prior statement is admissible as substantive evidence if (1) the declarant testified; (2) the prior statement is not consistent with the declarant's trial testimony; and (3) the court is satisfied of the existence of one or more of the indicia of reliability set out in subsection (a). To this Court, K. S. asserts that none of these criteria were satisfied. We do not agree.

A blanket refusal to testify or a feigned loss of memory?

K. S.'s principal argument is that what J. actually said on the witness stand was the equivalent of a blanket refusal to testify. If we were to agree—and we do not—then evidence as to his prior statements would not be admissible under Rule 5-802.1. As the Court explained in *Tyler*, a blanket refusal to testify is not a basis for admission of a prior inconsistent statement:

> [A]side from giving his name and address and stating that he understood the questions being put to him, [the witness] gave no testimony at all. He made clear that he would not answer any questions about the shooting. The effect was virtually the same as if [the witness] had not physically taken the witness stand. Clearly, if [the witness] had not taken the stand, his prior testimony could not be deemed "inconsistent."

342 Md. at 776.

In contrast, a witness's selective memory loss can render a witness's prior statement about the same incident "inconsistent." *See Nance v. State*, 342 Md. 766, 777 (1996) ("Inconsistency includes both positive contradictions and claimed lapses of memory. When

a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied.").

Returning to the case before us, it is clear that J. provided *some* testimony about the day the incident occurred. Specifically, he denied "hanging out" with, speaking to, or encountering appellant on January 17th. When the prosecutor asked him if appellant "put his hands on [him] at all," he responded that he "[didn't] know" and "[didn't] remember." Thus, the present case is different from *Tyler*, in which the witness refused to provide any testimony at all. Although the trial court initially ruled that J. could not be cross-examined, the court brought J. back to the stand for cross-examination because "he did testify about some things and the Defense ha[d] a right to cross examine him about the portion that he did testify about." At this point, however, the defense waived the cross-examination. "The Confrontation Clause guarantees only *an opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Nance*, 331 Md. at 572 (emphasis in original; citations omitted).

We are aware that the trial court characterized its decision to admit the statements as being based upon its conclusion that J. refused to testify, which is not a ground for admitting a prior inconsistent statement. *Tyler*, 342 Md. at 777-78. The fact remains, however, that J. did testify before deciding to invoke his imaginary right to remain silent. Moreover, the court's finding that J. had "been influenced, pressured or otherwise instructed about this right to remain silent that doesn't exist," implied that J. was feigning

memory loss when he claimed not to remember whether K.S. had "put his hands" on him, which rendered his prior statement inconsistent under *Nance*.

Whether hearsay evidence is admissible is a question of law, and we review the trial court's ruling *de novo. Gordon v. State*, 431 Md. 527, 533 (2013) (citing *Bernadyn v. State*, 390 Md. 1, 8 (2005)). Because there is a basis in the record to support the result reached by the trial court, we will not disturb its ruling, even though our reasoning differs. *See, e.g.*, *Gerald v. State*, 137 Md. App. 295, 305 (2011) ("[E]ven if the trial court improperly admitted the evidence under [Courts and Judicial Proceedings Article] § 10-906, we would affirm the judgment because the court properly could have admitted the evidence under Rule 5-901(b)(4).").

Were there sufficient indicia of reliability?

We agree with the State that both statements satisfied Rule 5-802.1(a)'s requirement for evidence of reliability.

Although Exhibit 1 was not signed by J., he testified that he wrote the passage himself. This is sufficient to warrant admission pursuant to Md. Rule 5-802.1(c) because the statement was "one of identification of a person made after perceiving the person." This Court has recognized that signed, written witness statements and statements on photo array cards are admissible evidence under the inconsistent prior statement hearsay exception, because they act as statements of "identification of a person after perceiving the person." *See Parker v. State*, 129 Md. App. 360, 381 (1999). *Conyers v. State*, 367 Md. 571, 605

n.33 (2002) (Because part of the witness's "statement concerning Petitioner's alleged confession was transcribed in his own handwriting, this portion of the statement might have satisfied the reliability requirements of Md. Rule 5-802.1(a)(3), allowing its possible admission as substantive evidence.").

Exhibit 2 was signed by J. This satisfies Md. Rule 5-802.1(a)(2).

Finally, appellant asserts that Exhibit 2 should have been excluded because the photo identification process was impermissibly suggestive and unfairly prejudicial. Appellant did not raise this issue at trial and cannot raise the issue for the first time on appeal. *See* Md. Rule 8-131(a). The reason for Rule 8-131(a)'s preservation requirement is illustrated by the present case. Before a pre-trial identification can be suppressed, it is incumbent upon the defendant "to make a prima facie showing of suggestivity at a suppression hearing." *Jones v. State*, 395 Md. 97, 115 (2006); *see also Thomas v. State*, 213 Md. App. 388, 417 (2013) (An accused "must show some unnecessary suggestiveness in the procedures employed by police" as the first step in suppressing a photographic identification. (Citation and some quotation marks omitted)). Because appellant did not raise the issue at trial, there is no evidentiary basis for us to decide whether J.'s pretrial identification was flawed by police error.[4]

[4] The State also asserts that appellant forfeited his right to raise this issue on appeal because his trial counsel "waived" cross-examination of J. after he had been called back to the witness stand for that express purpose. In another case, we might agree. In this case, however, J. made it very clear that he would not answer further questions after he was

B. The evidence was sufficient to find that appellant was involved in all of the counts alleged in the petition.

Appellant contends that none of the court's findings as to involvement can stand because the State's evidence was contradictory, uncorroborated, and legally insufficient. Furthermore, appellant asserts that there was no testimony about the value of the property stolen. We do not agree.

When reviewing the sufficiency of the evidence:

> We must determine 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. This inquiry is one of law, so that our review of this legal determination is plenary. This same standard of review applies in juvenile delinquency cases. In such cases, the delinquent act, like the criminal act, must be proven beyond a reasonable doubt.

In re James R., 220 Md. App. 132, 137 (2014) (quotation marks and citations omitted).

Robbery with a dangerous weapon requires proof of four elements: (1) that the defendant took the victim's property, (2) that the defendant took the property by force or threat of force, (3) that the defendant took the property while using a dangerous weapon, and (4) that the defendant took the property with the intent to deprive the victim of the property. *Jones v. State*, 217 Md. App. 676, 700, *cert. denied*. 440 Md. 227 (2014) (citations omitted). For conspiracy, "[t]he essence of a criminal conspiracy is an unlawful

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recalled to the stand. Trial counsel's use of the term "waive" may have been maladroit, but we view it as a recognition that hectoring J. with further questions would have served no useful purpose.

agreement. The agreement need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design. In Maryland, the crime of conspiracy is complete when the unlawful agreement is reached, and no overt act in furtherance of the agreement need be shown." *Alston v. State*, 414 Md. 92, 114 (2010). The crime of assault in the second degree includes placing the victim in reasonable fear of imminent bodily harm. *Snyder v. State*, 210 Md. App. 370, 381–82 (2013).

We conclude that the evidence was sufficient to find appellant involved in all counts. J. specifically told the police that appellant took his backpack and phone while either appellant or D. B. held a knife to his throat. This evidence was legally sufficient to support the court's findings of involvement in robbery, robbery with a dangerous weapon, and assault in the second degree. There was direct evidence (in the form of D. B.'s testimony) that appellant had a conversation with the others to rob J. This, in conjunction with J.'s statements, is a sufficient basis for the court's finding of involvement on the conspiracy charge. Additionally, for theft under $1,000, the State must only prove that the property had some value. Md. Code Ann., Crim. Law Section 7-103(e)(1). J. testified that his phone and backpack were stolen. The court could conclude beyond a reasonable doubt that the cellphone and backpack had monetary value.

Second, appellant points to what he asserts are contradictions and inconsistencies in the State's case. This is not a basis for appellate relief. "[C]ontradictions in testimony go to the weight of the testimony and credibility of the evidence, rather than its sufficiency,

and we do not weigh the evidence or judge the credibility of the witnesses, as that is the responsibility of the trier of fact." *Pryor v. State*, 195 Md. App. 311, (2010); *see also Grimm v. State*, 447 Md. 482, 506 (2016) ("In its assessment of the credibility of witnesses, a fact-finder is entitled to accept—or reject—all, part, or none of the testimony of any witness, whether that testimony was or was not contradicted or corroborated by any other evidence.") (citation, emphasis, and quotations removed).

THE JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, SITTING AS A JUVENILE COURT, IS AFFIRMED. APPELLANT TO PAY COSTS.