UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0210

September Term, 2015

IN RE: RASHAUN C.

Woodward,
Friedman,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Thieme, J.

Filed: February 29, 2016

Rashaun C., appellant, was charged as a juvenile in the Circuit Court for Baltimore City with what would constitute robbery with a dangerous weapon and related offenses if the acts had been committed by an adult. After a hearing before a magistrate on January 15, 2015, he was found involved on ten counts and committed to the Department of Juvenile Services. Thereafter, Rashaun C. filed exceptions to the magistrate's findings.

After a *de novo* hearing on March 2, 2015, Rashaun C. was found involved on the charges of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, robbery, conspiracy to commit robbery, second-degree assault, theft of property having a value of less than $1,000, and conspiracy to commit theft of property having a value of less than $1,000. The juvenile court determined that the robbery and conspiracy to commit robbery merged with the robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon, respectively. The court also determined that Counts 7 and 8, both of which charged Rashaun C. with second-degree assault, were duplicative and that Count 8 merged with Count 7. Rashaun C. was committed to the Department of Juvenile Services for placement in a program that would include behavior modification, victim awareness services, educational services, and substance abuse treatment, as necessary. This timely appeal followed.

ISSUE PRESENTED

The sole issue presented for our consideration is whether the juvenile court erred in restricting Rashaun C.'s ability to confront his accuser with prior inconsistent statements.

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

Eighteen-year-old DaQuon M. testified that he knew Rashaun C. from around the south Baltimore neighborhood where he used to live. On September 1, 2014, DaQuon left his father's home on Eagle Street near Wilkins Avenue at about 9 p.m. and walked to a store on Christian Street to get some snacks. After purchasing the snacks, DaQuon walked towards his mother's house on Bentlou Avenue. On the way, he saw three boys who asked if he was "good" and then started following him. Eventually, the boys circled DaQuon.

One of the boys, identified as Rashaun C., "whipped out" from his "dip" area a black metal gun that was about six inches long and told DaQuon to "kick your money out." DaQuon testified that Rashaun C. was not wearing a shirt, but wore dark blue shorts. Another boy, identified as W.S. B'Quan, reached into DaQuon's pocket and grabbed $240. Afraid that he would be shot, DaQuon took off running toward his father's house. He told his father what happened and the police were called.

The police drove DaQuon around the neighborhood and eventually he spotted Rashaun C. sitting on some steps on Christian Street "chilling with" four or five other boys, none of whom had been involved in the robbery.

Rashaun C. testified that he did not see DaQuon on September 1, 2014. He stated that he had been at "the rec" center, returned home to get some water from his "ma's" house, and

then sat on the front steps with his "homeboys," Aggie, Dayday, and Troy. While he was sitting on the steps, the police "jumped out the car . . . with guns and told everybody to put their hands up." He was then arrested. At the time of his arrest, Rashaun C. had twenty dollars in his pocket. No gun was recovered.

We shall include additional facts as necessary in our discussion of the issue presented.

DISCUSSION

Rashaun C. contends that the juvenile court erred in restricting his ability to cross-examine DaQuon and thereby deprived him of his right to a fair trial under the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights.[1] He maintains that the court prevented him from eliciting discrepancies between DaQuon's trial testimony and his statements to Officer Hayward regarding the description of his assailants and the location of the incident. In addition, Rashaun C. contends that the circuit court unduly curtailed his efforts to question DaQuon about his testimony before the magistrate.

[1] The Confrontation Clause of the Sixth Amendment provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]" U.S. Const. amend VI. Article 21 of the Maryland Declaration of Rights states that "in all criminal prosecutions, every man hath a right ... to be confronted with the witnesses against him ... [and] to examine the witnesses for and against him on oath[.]" Md. Decl. of Rts. art. 21. The Confrontation Clause of the Sixth Amendment is applicable to the States through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 404 (1965). The Confrontation Clause and Article 21 have an identical reach. *Derr v. State,* 434 Md. 88, 103 (2013).

A. Standard of Review

The standard of appellate review of an evidentiary ruling turns on whether the trial judge's ruling was based on a pure question of law, on a finding of fact, or on an evaluation of the admissibility of relevant evidence. In *Brooks v. State*, 439 Md. 698 (2014), the Court of Appeals set forth the standards of review as follows:

> Questions of law are reviewed without according the trial judge any special deference; findings of fact are assessed under a "clearly erroneous" standard; and an assessment of the admissibility of relevant evidence is reviewed under an abuse of discretion standard.

Id. at 708 (citations omitted).

B. Statements Made to Officer Hayward

Rashaun C. argues that because the only evidence against him was provided by DaQuon, who identified him as one of the three boys who robbed him, his sole means of defense was to impeach DaQuon. On cross-examination, defense counsel asked DaQuon if he told Officer Terrence Hayward, the police officer who responded to his father's house, that he had been "walking northbound in the 500 block of South Smallwood[.]" DaQuon began to respond, stating that he did not give the police officer an "exact address," but the State objected on the ground that defense counsel was reading from, and drawing questions from, the police report. The State argued that any statements made by DaQuon to the officer that were included in the police report constituted hearsay. Defense counsel countered that

because DaQuon was present and available for examination, his prior inconsistent statements would not constitute hearsay. The following colloquy occurred:

> THE COURT: I'm going to allow cross examination to the extent that it was covered in the direct examination by the State as to the nature of what was reported to the police. However, for a prior inconsistent statement I think there are a few more steps you need to do to confront this witness with that statement.
>
> [DEFENSE COUNSEL]: Fair enough.
>
> THE COURT: Thank you.
>
> [DEFENSE COUNSEL]: I'm asking him about his prior statements to the police officer is all.
>
> THE COURT: And to the extent that it's related to what was on direct, there was very little in direct about the nature of the conversation with the police. So I'm giving you some latitude.
>
> [DEFENSE COUNSEL]: I understand what you're saying.
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> * * *
>
> [DEFENSE COUNSEL]: You did speak to the police when they came to your father's house, correct?
>
> [DAQUON M.]: Correct.
>
> Q. And you told them that you were approached by three black males, correct?
>
> A. Mm-hmm.
>
> Q. And that they were wearing shorts.
>
> A. Mm-hmm.

Q. And that none of them had on shirts, is that correct?

A. Mm-hmm.

Q. Dark skinned.

A. Right.

Q. And had gold teeth, correct?

A. Right.

Q. And an afro?

[PROSECUTOR]: Your Honor, again, I'm sorry.

THE COURT: Sustained.

[PROSECUTOR]: I'm going to have to object.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Your Honor, this is the witness's own prior statement.

THE COURT: Thank you. Thank you. But to the extent that [t]his was not drawn out in direct I'm sustaining the objection, sir. If you want to point out something that he said today which is inconsistent then I think that you need to follow the procedure for an inconsistent statement.

[DEFENSE COUNSEL]: Did you speak the police [sic] on a prior occasion?

[DAQUON M.]: Yes, sir.

Q. Did you provide the police with additional details beyond what [the Prosecutor] asked you about?

A. Can you restate the question?

Q. I'll be happy to. Did you tell the police back on September 1st that the dark skinned male with gold teeth had an afro?

[PROSECUTOR]: Your Honor, objection again.

THE COURT: Sustained.

Rashaun C. argues that the juvenile court erred in restricting the cross-examination of DaQuon to matters covered in the State's direct examination. In addition, because a witness may be examined as to prior inconsistent statements for impeachment purposes, it was appropriate for him to make use of the police report to elicit discrepancies between what DaQuon told Officer Hayward on the night of the incident and what he testified to on direct examination with respect to the location of the robbery and description of the assailants.

With some exceptions that are not applicable here, "cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." Md. Rule 5-611(b). In *DeLilly v. State*, 11 Md. App. 676 (1971), we clarified that:

> cross-examination to impeach, diminish, or impair the credit of a witness is not confined to matters brought out on direct examination; it may include collateral matters not embraced in the direct examination to test credibility and veracity, it being proper to allow any question which reasonably tends to

> explain, contradict, or discredit any testimony given by the witness in chief, or which tends to test his accuracy, memory, veracity, character, or credibility.

Id. at 681.

In the instant case, however, the trial judge was confronted with two issues at the same time. One was the State's objection to defense counsel reading from a police report that was not in evidence and that constituted hearsay. The other issue was defense counsel's claim that he intended to impeach DeQuon with prior inconsistent statements made to Officer Hayworth and included in the police report. In addition to instructing defense counsel that cross-examination would be allowed "to the extent that it was covered in the direct examination by the State as to the nature of what was reported to the police," the court instructed defense counsel that "for a prior inconsistent statement I think there are a few more steps you need to do to confront this witness with that statement," and that defense counsel needed to "follow the procedure for an inconsistent statement."

Maryland Rule 5-616[2] permits extrinsic evidence of prior inconsistent statements to be used for the purpose of impeachment, in accordance with Maryland Rule 5-613(b).[3] In *Hardison v. State*, 118 Md. App. 225 (1997), we recognized that in order for extrinsic

[2] Maryland Rule 5-616 provides, in part, as follows:

> (a) **Impeachment by inquiry of the witness**. The credibility of a witness may be attacked through questions asked of the witness, including questions that are directed at:
>
> (1) Proving under Rule 5-613 that the witness has made statements that are inconsistent with the witness's present testimony;
>
> * * *
>
> (b) **Extrinsic impeaching evidence**. (1) Extrinsic evidence of prior inconsistent statements may be admitted as provided in Rule 5-613(b).

[3] Maryland Rule 5-613 provides:

> (a) **Examining witness concerning prior statements.** A party examining a witness about a prior written or oral statement made by the witness need not show it to the witness or disclose its contends at that time, provided that before the end of the examination (1) the statement if written, is disclosed to the witness and the parties, or if the statement is oral, the contents of the statement and the circumstances under which it was made, including the persons to whom it was made, are disclosed to the witness and (2) the witness is given an opportunity to explain or deny it.
>
> (b) **Extrinsic evidence or prior inconsistent statement of a witness**. Unless the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible under this Rule (1) until the requirements of section (a) have been met and the witness has failed to admit having made the statement and (2) unless the statement concerns a non-collateral matter.

evidence of a witness's prior inconsistent oral statement to be admissible for impeachment purposes, Maryland Rule 5-613(b) requires that the following foundation be laid:

> 1) the contents of the statement and the circumstances under which it was made, including the person to whom it was made, must have been disclosed to the witness during his trial testimony; 2) the witness must have been given the opportunity to explain or deny the statement; 3) the witness must have failed to admit having made the statement; and 4) the statement must concern a non-collateral matter. Before the requirements of Rule 5-613(b) come into play, however, the prior statement of the witness must be established as inconsistent with his trial testimony. *See Stevenson v. State*, 94 Md. App. 715, 721, 619 A.2d 155, 158 (1993).

Hardison, 118 Md. App. at 237-38.

In *Brooks v. State*, 439 Md. 698 (2014), the Court of Appeals addressed the issue of impeachment by prior inconsistent statement, commenting that:

> it would be unfair to impeach a witness with a statement which could not fairly be said to be the witness's own rather than the product of the investigator's selections, interpretations, and interpolations. We hold that a witness may not be impeached with extrinsic written evidence of a prior allegedly inconsistent oral statement, unless the written evidence is a substantially verbatim version of the oral statement or was previously acknowledged by the witness as an accurate version.

Brooks, 439 Md. at 727.

In the case before us, no police officer testified. There is nothing in the record before us to suggest that the police report contained a "substantially verbatim"recording of what DaQuon said to Officer Hayward. There is no evidence that DaQuon signed, approved, or otherwise ratified the statements in the police report as his own. Under these particular

circumstances, DaQuon could not be impeached with his oral statements to Officer Hayward because the officer did not testify as to what DaQuon's statements had been and the actual written police report was not admissible because it constituted hearsay.

As defense counsel was using the police report in his questioning of DaQuon in such a way as to bring into evidence statements that constituted hearsay, the trial judge did not abuse her discretion in instructing defense counsel to limit his cross-examination to what was brought out on direct examination and follow the appropriate procedure for impeaching DaQuon with prior inconsistent statements that might have been contained in the police report.

C. Statements Made Before the Magistrate

Rashaun C. also contends that the juvenile court erred in curtailing his cross-examination of DaQuon with respect to statements made at the January 15, 2015 hearing before a magistrate. On cross-examination during the trial, DaQuon testified that one of the boys who robbed him, not Rashaun C., took $240 from his pocket. Defense counsel asked DaQuon if he remembered telling Officer Hayward that the boy took $120, and DeQuon said he did not. Defense counsel asked DaQuon if he remembered telling Officer Hayward that $140 was taken from him and, again, DaQuon said he did not. Thereafter, the following colloquy occurred:

> [DEFENSE COUNSEL]: How about when you testified in front of Master Peacock back on January 15? Do you remember telling Master Peacock that it was $100 that was taken?
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> [PROSECUTOR]: Objection, Your Honor.
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> THE COURT: Hold on. Hold on. Sustained.
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> [PROSECUTOR]: Move to strike.
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> THE COURT: Granted. It's a de novo exception, sir.
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> [DEFENSE COUNSEL]: I understand, Your Honor, but that's deposition. It was a sworn statement under oath.
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> THE COURT: And if you had that here I'd be able
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> [DEFENSE COUNSEL]: And I'm asking the witness whether he remembers it, I'm testing his memory.
>
> THE COURT: Thank you. Sustained.

As we have already stated, because Officer Hayward did not testify, and there was no other evidence to establish that the statements included in the police report were made by DaQuon, defense counsel could not use those statements for impeachment purposes. Moreover, it is unclear from the questioning at trial exactly what was included in the police report with respect to the amount of money that was taken from DaQuon, as defense counsel questioned DaQuon about having been robbed of $120 and then $140.

With respect to questioning about DaQuon's testimony before the magistrate, even assuming that the trial judge erred in curtailing defense counsel's cross-examination of

DaQuon because the transcript from the magistrate's hearing was not presented, any error was harmless beyond a reasonable doubt. *Dorsey v. State*, 276 Md. 638, 659 (1976). The transcript of the hearing before the magistrate that is included in the record before us shows that DaQuon testified that the amount stolen from him was "over a hundred dollars." As DaQuon's testimony before the magistrate was not inconsistent with his testimony at trial that one of the boys took $240 from him, defense counsel could not use it to impeach DaQuon. *See Hardison*, 118 Md. App. at 237-38 (prior statement of witness must be established as inconsistent with his trial testimony)(relying on *Stevenson v. State*, 94 Md. App. 715, 721, 619 A.2d 155, 158 (1993)).

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