Circuit Court for Prince George's County
CC #: JA-16-0023

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 881

September Term, 2016

IN RE: D. B.

Krauser, C.J.,
Nazarian,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 5, 2017

*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.

Found to be involved in the delinquent act of second degree assault, in the Circuit Court for Prince George's County (sitting as the juvenile court), D. B., appellant, contends that the court erred by purportedly considering, as substantive evidence, a cell phone video which had been introduced at trial, by the State, for impeachment purposes only. For the following reasons, we affirm the judgment of the juvenile court.

Appellant was accused of assaulting the victim, a 13 year-old girl, while the victim was actively involved in a fist fight with appellant's sister, M.W. Before the adjudicatory hearing began, the State moved in limine to admit into evidence a cell phone video of the assault, taken by an onlooker, that the victim had shown to the prosecutor the morning of the hearing. Defense counsel objected to the use of the video, on grounds that the State had not produced it in discovery, despite the fact that the State had been aware of the existence of the video, and had an opportunity to obtain it prior to the morning of the hearing. The court ruled that the State could not introduce the video into evidence in its case-in-chief, but that the State might "be able to use it in cross[.]"

The State called the 13 year-old victim as its only witness. She testified that she was involved in a fight with M.W, and then explained how appellant got involved in the fight:

> [w]hen I was on the ground, we [she and M.W.] were both on the ground, we were still hitting each other and I was trying to get up and get my balance. [M.W.] was still on the ground so [appellant] came over and he pushed me back on the ground and stood over top of me so I couldn't get up.

M.W. was called as a witness for the defense. On direct examination, M.W. was asked whether she saw appellant touch the victim, and she responded, "[h]e did not. I did not see that happen."

During cross-examination of M.W., the State played the cell phone video, and M.W. stated that the video showed her brother standing over the victim. When the prosecutor then asked, "[w]ho is that your brother just pushed[?]", M.W. responded, "I didn't see him push anybody." The video was played again and the prosecutor posed the same question. M.W. responded, "he didn't push anybody, he was standing right there. He did not push anybody, he was, he just came and stood there. . . . I didn't see, I didn't see him push her. I didn't see her, I didn't see him push her."

The prosecutor then moved the video into evidence, asserting that M.W. had "said in direct examination that her brother never hit [the victim,]" and represented that the video showed that M.W. was "right here when her brother hits [the victim]" and that "she would have seen it if she was literally right there." The court admitted the video "for impeachment purposes."

On appeal, appellant contends that the court improperly considered what was depicted in the video as substantive evidence when it found him involved in second degree assault. In support of this contention, appellant points to (1) the State's closing argument, wherein the prosecutor suggested that the video showed an assault; and (2) defense counsel's closing argument, during which she engaged in a colloquy with the court about whether the video supported the defense theory that, "to the extent there was any touching it could fit defense of others and it's reasonable."

As appellant concedes, this claim is not preserved for appellate review.[1] Even if preserved, and if we were to grant, as appellant requests, plain error review, the claim is without merit. We begin with the presumption that the juvenile court considered the video only for the purpose for which it had been admitted. We see nothing in the record to rebut that presumption. Although both the prosecutor and defense counsel discussed the contents of the video in their closing arguments, and the court expressed disagreement with defense counsel's characterization of appellant's actions as a justified attempt to protect M.W., it does not necessarily follow that the court then considered the video for any purpose other than impeachment of M.W. Indeed, the juvenile court found that M.W.'s testimony was "properly impeached by the video, where she denies that [appellant] pushed or hit [the victim.]"

Moreover, there is nothing in the juvenile court's ruling to suggest that it considered the video as substantive evidence. The court stated:

> I find [appellant] involved as to the second degree assault. Again, I do believe that without leave or justification, [he] became involved in the incident, although he didn't punch or slap her, I mean it wasn't a violent contact, but nevertheless, he used his size, age and authority to do that.

[1] When the video was offered into evidence by the State, during the cross examination of M.W., for the purpose of either refreshing her recollection, or impeaching her testimony, defense counsel objected, asserting only that it did not serve either purpose. But, defense counsel made no objection later in the trial, during closing arguments, claiming, as appellant now does on appeal, that the video was then being used for purposes other than that for which it had been admitted. Accordingly, the issue is not properly before us for review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]")

This finding was wholly supported by the victim's testimony that appellant "pushed [her] back on the ground" and then "stood over [her] so that she could not get up." In sum, there is nothing in the record that suggests that the court considered the contents of the cell phone video as substantive evidence that appellant was involved in the delinquent act of second degree assault.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.