Circuit Court for Harford County
Case No. C-12-JV-18-000145818

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED CASES

No. 2761
September Term, 2018

No. 492
September Term, 2019

IN RE: N.P.

Kehoe,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: July 22, 2020

On October 29, 2018, the Circuit Court for Harford County, sitting as a juvenile court, found then 17-year-old N.P., appellant, involved in what would constitute the crimes of first-degree rape, second-degree rape, and second-degree assault if committed by an adult. At the November 28, 2018, disposition hearing, the juvenile court determined that N.P. was a delinquent child and committed him to the Department of Juvenile Services for institutional placement, to be stayed pending final disposition of his unrelated adult charges in the circuit court. The juvenile court further ordered N.P. to comply with the requirements of the Juvenile Sex Offender Registry. N.P. noted a timely appeal of the juvenile court's decision. The appeal was docketed as No. 2761, September Term, 2018, in this Court.

N.P. filed a petition to vacate the delinquency finding, which the juvenile court denied by written order dated March 20, 2019. On May 17, 2019, the juvenile court granted N.P. permission to file a belated notice of appeal from the denial of the petition. N.P. filed the belated notice of appeal on May 22, 2019. The second appeal was docketed as No. 492, September Term, 2019, in this Court. By order dated September 24, 2019, we ordered that the two appeals be consolidated.

N.P. asks us to consider the following questions:

1. Is the evidence legally insufficient to sustain the finding that Appellant was involved in the delinquent acts of first degree rape, second degree rape, and second degree assault?

2. Did the court below err by denying the Petition to Vacate Delinquency Finding?

For the reasons that follow, we affirm the juvenile court's finding of delinquency and its denial of the petition to vacate the delinquency finding.

FACTS AND LEGAL PROCEEDINGS

At approximately 1:00 p.m. on February 17, 2017, Harford County Sheriff's Office Deputy Anthony Isgro responded to 1704 Trimble Road in response to a call about a female who was walking around underdressed for the cold winter weather and who appeared to be under the influence of drugs or alcohol. When Isgro arrived at the scene, the female, who identified herself as 14-year-old A.H., was sitting on a curb with an employee of a nearby business, wearing only one boot and a tee shirt. The employee's hoodie covered her lap, to compensate for the fact that she was wearing no bottoms. A.H.'s face was caked with blood and dirt, her arms were covered in scratches and bruises, and she was confused, lethargic, and shivering, appearing to Isgro to have been outside in the cold for a long while. Given her state of undress, Isgro believed she had been sexually assaulted.

Deputy Jeffrey Carlson was dispatched to a wooded area near the spot where A.H. had been found, to process a potential sexual assault crime scene. On a trail leading into the woods, Carlson located a cell phone with earbuds plugged into it, a school absence note signed by A.H.'s mother, a fringed woman's or girl's boot, a single sock, and black pants with underwear inside; the items were not located together but were spread out over several yards. A.H. identified the cell phone as hers and the boot as the match to the one she was wearing when she exited the woods.

A.H.'s mother, S.J., and EMS responders arrived at the scene, and A.H. was transported to the Harford Memorial Hospital emergency room. Isgro followed the

ambulance to the hospital and collected the clothes A.H. had been wearing for submission to the crime lab for forensic testing.

Upon her arrival at the emergency room, A.H. had debris in her hair and on her face, blood on her nose and hands, swollen and abraded hands, blisters, cuts, and bruises on her feet, and a blue tinge to her skin from exposure to the elements. She was hypothermic and could not walk on her own, due to the dislocation of both knee caps.

Jennifer Hokuf, accepted by the juvenile court as an expert in the fields of Sexual Assault Forensic Examination ("SAFE") and forensic nursing, conducted a SAFE exam upon A.H. and completed a rape kit for the police. When Hokuf entered the room, A.H. was filthy, difficult to arouse, and incoherent. A.H. told Hokuf that she did not remember anything that had happened to her after she had left home at approximately 4:00 p.m. the day before. She did not disclose a sexual assault, but Hokuf testified that victims of sexual assault often suffer memory gaps from the trauma of the event.

Hokuf observed multiple abrasions and lacerations on A.H.'s legs, a puncture wound to her foot, disjointed knees, contusions on her jaw and neck, debris in her hair, lacerations on her abdomen, abrasions with swelling and redness on her hands, abrasions on her chest and forehead, and dried blood in her nose. On A.H.'s external genitalia, Hokuf observed swelling, redness, and specks of brown debris. Upon internal examination, Hokuf noted a clearly visible tear at the six o'clock location on A.H.'s posterior fourchette—a tissue fold at the bottom of the entrance to the vagina—caused by blunt force trauma; of

her 97 SAFE exams, Hokuf said the tear was the most serious she had observed.[1] Also during the internal examination, Hokuf observed white secretions consistent with seminal fluid. She took swabs of A.H.'s internal and external genitalia for submission for DNA analysis.

Detective Carey Gerres, assigned to the Child Advocacy Center, responded to Harford Memorial Hospital to investigate the suspected case of sexual abuse. Gerres later obtained a search and seizure warrant for N.P.'s DNA.

After DNA obtained from A.H.'s vagina, cervix, and anal/perianal area showed that N.P. was a major contributor, with no indication of another male's DNA, Gerres obtained an arrest warrant for N.P., and he was arrested on October 10, 2017. During his recorded interview, N.P. admitted to meeting A.H. on February 16, 2017, near the Mystic Mart convenience store not far from where A.H. had been found, but he said that they had gone to his cousin's house in the Meadowood housing development, where they had smoked pot and engaged in consensual sex, after which A.H. had left.[2] The location he gave to Gerres for the sexual encounter during the interview differed from text messages he had sent to A.H. shortly after the incident, which indicated they had been in Harford Square, a different neighborhood.

[1] Hokuf agreed that such tears can be caused by consensual sex but opined that the depth of the tear in A.H.'s case was "less consistent" with consensual sex. Susan Bertolo, the defense's SAFE nurse expert witness, acknowledged that fewer than 50% of tears to the posterior fourchette, and possibly as few as 10%, are easily visible to the naked eye.

[2] Despite N.P.'s assertion that A.H. had smoked marijuana on February 16, 2017, she tested negative for marijuana and other drugs the next day.

A.H. testified that she had met N.P. through his girlfriend, M.S., and that they were good friends; in fact, A.H. considered N.P. to be "like a brother" to her. On February 16, 2017, she said she and N.P. had communicated via text message on Snapchat, agreeing to meet at the Mystic Mart to "hang out" near the Meadowood housing development. Although A.H. remembered meeting N.P. at the Mystic Mart, she did not remember anything that happened thereafter, until she woke up in the hospital. She denied any sexual contact with N.P. prior to February 16, 2017, and denied intending, or agreeing, to have sexual contact with him that day.

Following the denial of his motion for judgment of acquittal, N.P. elicited the testimony of Susan Bertolo, as a defense SAFE examination and forensic nursing expert. Bertolo stated that posterior fourchette injuries are the most common injury seen as a result of vaginal penetration, either consensual or non-consensual, and that such an injury is not necessarily indicative of non-consensual sex.

According to Dr. Ray Gerard, an emergency medicine doctor called as an expert by the defense, the scrapes and abrasions observed on A.H. did not create a substantial risk of death, disfigurement, or impairment of bodily function. He added that her "patellar dislocation"—rather than the more serious knee dislocation noted by Hokuf—is a "common finding in adolescents" and may not have been indicative of an injury, although he acknowledged that it could occur if someone were being held by the ankles and twisting

her legs.[3] He further opined that A.H.'s knee issues were not life threatening or likely to cause protracted disfigurement.

Gerard added that, despite Hokuf's testimony that a sexual assault could have caused A.H.'s memory loss, no medical professional had diagnosed trauma as the cause of A.H.'s memory loss. And, because hospital tests had ruled out infection, the "most common and likely" reason for A.H.'s altered mental state on the date in question was that she had ingested a drug that did not show up on the drug screen run in the emergency room. He agreed, however, that no medical personnel had drawn a conclusion about drug ingestion.

At the close of all the evidence, the juvenile court denied N.P.'s renewed motion for judgment of acquittal.

DISCUSSION

I. Sufficiency of the Evidence

N.P. argues that the evidence adduced by the State is insufficient to sustain a finding of involvement in what would be the crimes of first-degree rape, second-degree rape, and second-degree assault if committed by an adult because the State failed to prove his criminal agency and failed to establish each element of the delinquent acts. In his view, in light of A.H.'s lack of memory of the events of February 16, 2017, the circumstantial evidence showed only that he had engaged in sexual intercourse with A.H., which he admitted. But, there was no evidence showing that he had inflicted any harm, or employed

[3] In rebuttal, A.H.'s mother testified that A.H. had never had any problem with her knees prior to February 2017.

any force or threat of force, on A.H., or proving that he had been in the woods where A.H.'s personal belongings had been found.

When faced with a challenge to the sufficiency of the evidence in a juvenile delinquency matter, as in any criminal case, we determine "'whether after reviewing 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.'" *In re Kevin T.*, 222 Md. App. 671, 676-77 (2015) (quoting *In re Anthony W.*, 388 Md. 251, 261 (2005)). The question before us is a narrow one; we do not ask "whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Allen v. State*, 158 Md. App. 194, 249 (2004)) (internal quotation marks omitted; emphasis in original). In addition, we "defer to the fact-finder's decision on which evidence to accept and which inferences to draw when the evidence supports differing inferences." *Morris v. State*, 192 Md. App. 1, 30 (2010). We will not disturb the findings of fact unless they are clearly erroneous. *In re Kevin T.*, 222 Md. App. at 677.

That said, the State must prove every element of a charged crime beyond a reasonable doubt to obtain a conviction. *Furda v. State,* 194 Md. App. 1, 65 (2010), *aff'd,* 421 Md. 332 (2011), *cert. denied*, 132 S.Ct. 2376 (2012) (citing *Bennett v. State*, 283 Md. 619, 625 (1978)); *see also Smith v. State*, 225 Md. App. 516, 520 (2015) ("Certainly, if an element of the offense has not been established, then the conviction fails as a matter of law."). The same standard applies to findings of delinquency in juvenile matters. Md.

Code, §3-8A-18(c)(1) of the Courts & Judicial Proceedings Article; Maryland Rule 11-114(e)(1).

Circumstantial evidence is sufficient to affirm the conviction as long as "'the circumstances support rational inferences from which the trier of fact could be convinced beyond a reasonable doubt of the guilt of the accused.'" *In re David P.,* 234 Md. App. 127, 134 (2017) (quoting *Painter v. State,* 157 Md. App. 1, 11 (2004)). "'Circumstantial evidence is as persuasive as direct evidence. With each, triers of fact must use their experience with people and events to weigh probabilities.'" *In re Lavar D.,* 189 Md. App. 526, 586 (2009) (quoting *Mangum v. State,* 342 Md. 392, 400 (1996)).

The juvenile court adjudicated N.P. involved in what constitute three crimes if committed by an adult: second-degree assault; second-degree rape; and first-degree rape. As pertinent to the facts of this matter, second-degree assault "of the battery variety is committed by causing offensive physical contact with another person." *Nicolas v. State*, 426 Md. 385, 403 (2012); *see also* Md. Code, § 3-201(b) of the Criminal Law Article ("CL"). A second-degree rapes occurs when a person engages in vaginal intercourse with another by force or threat of force without the consent of the other. CL § 3-304(a)(1). And, the offense is upgraded to a first-degree rape when the vaginal intercourse by force or threat of force is accompanied by suffocation, strangulation, disfigurement, or infliction of serious injury on the victim in the course of committing the crime.

Here, the State adduced evidence that A.H., aged 14, was last seen by her mother at approximately noon on February 16, 2017, and that A.H. recalled leaving her home at

approximately 4:00 p.m. that day. She communicated with N.P., agreeing to meet him at the Mystic Mart, with plans to hang out in a nearby housing development.

Approximately 21 hours later, A.H. was found wandering out of a wooded area not far from where she planned to meet N.P., covered in dirt and debris, injured over her entire body with cuts, scrapes, lacerations, and a puncture wound to one foot, partially clothed, hypothermic, and incoherent. Her cell phone, some clothing items, her one missing boot, and a note signed by her mother were found in the wooded area, spread out over some distance.

Upon being taken by ambulance to the emergency room, A.H. recalled nothing of the events that led to her being in the woods. She did not disclose a sexual assault, but a SAFE examination and subsequent DNA analysis revealed that she had had vaginal intercourse with N.P., with no other male DNA found. Evidence of blunt force during the intercourse included a deep and visible tear to her posterior fourchette, the depth of which, according to Hokuf, was inconsistent with consensual sex, and redness and swelling to her external genitalia. Despite having no history of problems with her knees, A.H. was also unable to walk, due to her kneecaps dislocating and relocating, which could have been caused, according to the State's SAFE nurse expert, by stretching the legs to the point that the ligaments and tendons couldn't hold the knees in place, and according to the defense medical expert, by being held by her ankles and twisting her legs.

N.P. admitted to having consensual intercourse with A.H. on February 16, 2017. He stated it occurred on a bed in his cousin's house, although he gave conflicting information about the location of their encounter. But, the evidence of dirt in A.H.'s vagina

belies N.P.'s claim of sex on a bed and leads to a permissible inference that the intercourse occurred outside, likely in the wooded area near where the pair met and A.H. was later found. The injuries to A.H.'s knees, the scrapes and abrasions all over her body (including bruising on her ankle), her memory loss and confusion that was possibly caused by ingestion of a drug or trauma, and the spread of her personal items over many yards permit a reasonable inference that N.P. dragged her into the woods by her ankles against her will or because she was incapacitated. A.H.'s testimony that she thought of N.P. as a big brother figure and had never before contemplated sexual activity with him, nor intended to have sexual activity with him on the day in question, adds to the circumstantial evidence that she did not consent to intercourse with him.

Despite evidence presented by Dr. Gerard that none of A.H.'s injuries were serious or life-threatening, A.H. was left partially unclothed and without a phone in the woods on a below-freezing February night and was injured or incapacitated enough that she was unable to find her way out of the woods to seek help for almost 24 hours. Those actions were sufficient for a finding that N.P. placed A.H. in risk of serious injury. *See In re Eric F.*, 116 Md. App. 509, 522 (1997) ("[T]he trial court had sufficient evidence before it to find that appellant knew that his actions. . . manifested extreme indifference to the value of [the victim's] life by leaving her in the cold, and failing to seek appropriate help."); *see also Walker v. State*, 53 Md. App. 171, 204 (1982) (Court had "no doubt" that broken nose and broken jaw comprised "serious physical injuries" sufficient to "raise ordinary rape to rape in the first degree").

A reasoning juvenile court could have relied on the testimony and the direct and circumstantial evidence to find that N.P.'s actions met the definitions of second-degree assault, second-degree rape, and first-degree rape if an adult had committed them. Consequently, the State presented sufficient evidence to the juvenile court to support his delinquency adjudication.

II. Petition to Vacate Delinquency Finding

N.P. also claims that the juvenile court erred in declining to vacate its delinquency finding after allegedly exculpatory evidence came to light during the discovery phase of his unrelated adult criminal case in the circuit court. The juvenile court's ruling that the evidence did not contain exculpatory information, was available to him irrespective of any disclosure by the State, was not relevant to the issues in the juvenile matter, and was not likely admissible in the juvenile matter in any event, he concludes, was erroneous and requires reversal of the juvenile court's order adjudicating him a delinquent child.

After the juvenile court's delinquency finding in November 2018, N.P. filed a petition to vacate the State's delinquency petition. Therein, he explained that in his delinquency matter, the juvenile court had found that the relationship between him and A.H. was platonic and that she considered him to be like a "big brother." In October 2018, during his unrelated murder case in the circuit court, however, his attorney—the same attorney who represented him in the juvenile matter—had been provided approximately 30 discs of recorded interviews during discovery, the volume of which purportedly rendered her unable to review them until after the adjudicatory hearing in the juvenile matter. When she did review the interviews, counsel heard a statement given on April 25, 2018, by C.D.,

a friend of M.S., N.P.'s girlfriend whom he was accused of murdering, which included information about the relationship between N.P. and A.H.:

> [C.D.]: She had gone through his phone and seen that [N.P.] and A.H. was texting so that's why she suspected that he did something with A.H. so that's why she stopped liking her.
>
> [PROSECUTOR]: What did she say about A.H.?
>
> [C.D.]: A.H. is a girl—a dummy. Every boy has pretty much slept with her.
>
> [PROSECUTOR]: Ok.
>
> [C.D.]: But she wasn't the type of girl who would lie about something like that.
>
> [PROSECUTOR]: What did she see in the phone between A.H. and [N.P.]?
>
> [C.D.]: I don't remember. She knows how it is.

Because N.P. presented a consent defense in the juvenile matter, he claimed that this information about a possible previous consensual relationship with A.H. was exculpatory and material to his case because the juvenile court had ruled there was no consensual sexual relationship between the pair. Had he been made aware of the conversation between C.D. and the prosecutor, he said he would have interviewed C.D., procured her testimony at his adjudicatory hearing, and subpoenaed the phone records of the relevant witnesses. Because the exculpatory material had not been disclosed by the State, he continued, the juvenile court should vacate the delinquency order.

The State responded that because C.D. was unable to recall details about the text messages between A.H. and N.P., they would neither have exculpated N.P., nor negated or mitigated his guilt or punishment, especially in light of the fact that N.P. and A.H. were

admittedly friends, and there was no dispute they texted each other often. Moreover, any evidence of text messages between N.P. and A.H. would have been available to N.P. and his counsel through reasonable investigative efforts, as the messages would have been present on N.P.'s phone and he would have known about them.

In its March 20, 2019 memorandum opinion and order, the juvenile court ruled that the conversation between C.D. and the prosecutor did not reveal any exculpatory information in the delinquency matter. And, even had N.P. called C.D. as a witness during his adjudicatory hearing, the court would not have found her testimony relevant to the issue of consent "or to any other issue related to the rape charge."

In addition, even if "somehow relevant," the juvenile court questioned the admissibility of the statement because C.D. spoke of information relayed to her by another person and not from first-hand knowledge of anything she knew from A.H. C.D. was also unable to recall what the messages she had seen actually said.

Finally, evidence at the delinquency hearing established that N.P. and A.H. texted each other frequently, and N.P.'s lack of knowledge of the conversation between C.D. and the prosecutor would not have prevented him from subpoenaing his own or A.H.'s phone records, although the necessity of doing so was questionable because N.P. would have known of the existence of prior communications he undertook with A.H.

Because the information did not have the tendency to negate N.P.'s culpability with regard to the most serious charge of first-degree rape, or to change the outcome of his delinquency matter, the juvenile court denied N.P.'s petition to vacate the delinquency

petition. We review the juvenile court's ruling for an abuse of discretion. *In re Elrich S.*, 416 Md. 15, 43-44 (2010).

Md. Rule 11-109(a)(3)(a) requires the State, in a juvenile delinquency matter, to provide to the respondent, without the necessity of a request, "any material or information within the knowledge, possession or control of the State which tends to negate the involvement of the respondent as to the offense charged."[4] To establish a violation of the Maryland discovery rules and the tenets of *Brady v. Maryland*, 373 U.S. 83 (1963), the defendant or juvenile respondent "must establish (1) that the prosecutor suppressed or withheld evidence that is (2) favorable to the defense—either because it is exculpatory, provides a basis for mitigation of sentence, or because it provides grounds for impeaching a witness—and (3) that the suppressed evidence is material." *Ware v. State*, 348 Md. 19, 38 (1997); *accord Yearby v. State*, 414 Md. 708, 717 (2010) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). The defendant or respondent bears the burdens of production and persuasion regarding the alleged *Brady* violation. *Yearby*, 414 Md. at 720.

The juvenile court found that the conversation between C.D. and the prosecutor was irrelevant, did not reveal exculpatory information, and was not suppressed in any event. We agree.

During her approximately 30 minute interview with the prosecutor relating to N.P.'s murder charges in the circuit court, C.D. made one brief statement that an unidentified

[4] N.P. avers that Rule 4-263(d)(5), applicable to criminal matters, governs because the statement given by C.D. occurred before this matter was transferred from the circuit court to the juvenile court. As pertinent to this matter, the Rules are substantially similar enough that our conclusion would be the same under either Rule.

person, presumably the murder victim, M.S., N.P.'s girlfriend who had introduced him to A.H., had gone through N.P.'s phone and seen texts between him and A.H., which led to the person "suspect[ing] he did something with A.H." and to cause her to stop "liking" A.H. as a result. Although C.D. opined that "[e]very boy has pretty much slept with" A.H., she did not state that N.P., specifically, had had intercourse with A.H., nor offer any evidence of the claim that A.H. had slept with a lot of boys, and she could not remember what the unidentified person saw in the texts between N.P. and A.H. to raise her concern.

In the absence of any first-hand knowledge by C.D. that N.P. and A.H. had previously engaged in consensual intercourse, or knowledge what the unidentified person had seen in the texts between the pair, the statement was entirely irrelevant to the issue of A.H.'s consent to sexual intercourse with N.P. on February 16, 2017, or ever, especially in light of A.H.'s testimony that she had never considered a sexual relationship with N.P., either prior to or on that day. The evidence therefore would not have been exculpatory.

Moreover, the evidence was not material. Evidence is considered material if "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Raynor v. State*, 201 Md. App. 209, 232 (2011) (quoting *Wilson v. State*, 363 Md. 333, 347 (2001)), *aff'd*, 440 Md. 71 (2014), *cert. denied*, 135 S.Ct. 1509 (2015). To show a reasonable probability of a different result, "'the likelihood of a different result must be substantial, not just conceivable.'" *State v. Syed*, 463 Md. 60, 87-88 (quoting *Harrington v. Richter*, 562 U.S. 86, 112 (2011)), *cert. denied*, 140 S.Ct. 562 (2019).

For the reasons listed above, we cannot conclude that, had the evidence been disclosed to the defense, the likelihood of a different result was substantial. Even were we to determine that C.D.'s statement somehow proved a prior consensual sexual relationship between N.P. and A.H., A.H.'s testimony that she had no intention of participating in sexual activity with him on February 16, 2017, along with the evidence of the injuries to her body and the callous disregard N.P. exhibited in leaving her unclothed in the woods on a winter night to fend for herself, would have been sufficient for the juvenile court to find incredible any claim of her consent on the date in question.

Finally, the State "'cannot be said to have suppressed evidence for *Brady* purposes when the information allegedly suppressed was available to the defendant through reasonable and diligent investigation.'" *Yearby*, 414 Md. at 723 (quoting *Ware*, 348 Md. at 39). Although defense counsel said she had not had time to review the many discs of interviews received in discovery in N.P.'s criminal case before the delinquency hearing approximately two weeks later, reasonable investigation likely would have revealed the interview with C.D. And, had text messages between N.P. and A.H. containing information about a consensual sexual relationship actually existed, N.P. would, or should, have known about the information in his own phone records and alerted defense counsel to subpoena the records of the text messages for use at his hearing. In other words, N.P. cannot claim that the State impermissibly suppressed evidence when the information supposedly suppressed was readily available to him.

Accordingly, the juvenile court did not err in declining to vacate the delinquency petition.

JUDGMENTS OF THE CIRCUIT COURT FOR HARFORD COUNTY, SITTING AS A JUVENILE COURT, AFFIRMED; COSTS TO BE PAID BY APPELLANT.