UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 627

September Term, 2016

IN RE: A.P.

Eyler, Deborah S.,
Nazarian,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: May 1, 2017

A.P., a thirteen-year-old girl, didn't want M.S., an eleven-year-old boy, to sit next to her on the school bus. So M.S. sat on A.P.'s feet, she pushed M.S. off of her, and an altercation ensued; A.P.'s sister, S.P., held M.S. down while the sisters continued hitting him. Another student separated M.S. and A.P., but A.P. resumed hitting M.S.

After a merits hearing, the Circuit Court for Prince George's County, sitting as a juvenile court, found A.P. involved after determining that she committed an act that, if committed by an adult, would have constituted second-degree assault (the court found S.P. not involved). A.P. challenges the sufficiency of the evidence underlying the court's finding that she committed an act equivalent to second-degree assault and its decision to prevent her counsel from cross-examining M.S. about his family's interactions with the press after the altercation. We affirm.

I. BACKGROUND

At the hearing, M.S. and A.P. recounted different versions of the incident, and the differences bear on A.P.'s sufficiency argument.

M.S., then a sixth-grader, testified that on December 16, 2015, he boarded the school bus and walked down the aisle looking for an available seat and found that the only available seat was next to A.P., then a seventh-grader. He did not see A.P.'s feet stretched across the seat when he first began to sit, but did notice them there after he sat down on them. He stood up and asked A.P. if she could move her feet, but she refused because she did not like him. So M.S. again sat on A.P.'s feet, even after A.P. told him "no." A.P. responded that "if [he] didn't move, she was going to punch [him]." M.S. didn't move,

and A.P. punched him in the face. M.S. acknowledged that after A.P. punched him first, he punched her back once, and then A.P. punched him repeatedly. A.P.'s sister, S.P., then grabbed his collar and hit him too. The fight was broken up and M.S. exited the bus, but he sustained injuries to his head, neck, and face.

A.P., on the other hand, testified that after M.S. boarded the bus, he initially walked towards his friends, but upon seeing A.P., he and his friends looked back at her, and then M.S. walked over and sat on her feet. A.P. told him to get off of her and M.S. told her "no," stood up, then sat on her feet again. A.P. again told M.S. to get off of her, but when he didn't, she pushed him off. Then, she said, M.S. pushed her, causing her head to hit the bus window, so she punched M.S., and that led to a fist fight. A.P. acknowledged that even after another student pulled her away and stood between her and M.S., she continued to reach over the other student to hit M.S.

In addition to the testimony, the State produced a video recording of the incident at the hearing, and both M.S. and A.P. agreed that it accurately portrayed the portions of the incident it captured (it didn't include the beginning). The first frame showed A.P. hitting M.S. and M.S. attempting to block A.P.'s punches. The video also showed A.P.'s sister hitting M.S. A third frame pictured M.S. shielding his head while A.P. repeatedly hit him. Another frame depicted an individual not involved in the incident getting between A.P. and M.S. and breaking up the fight.

Defense counsel sought to cross-examine M.S. about statements he and his parents made to the media after the incident, but the court sustained the State's objections. At the

close of the hearing, the court determined that A.P.'s actions constituted a second-degree assault and found her involved.

This timely appeal followed. We will discuss additional facts below, as necessary.

II. DISCUSSION

A.P. raises two issues on appeal: she argues *first* that the evidence was insufficient to support the court's finding that her actions constituted a second-degree assault, and *second* that the court erred when it precluded her from cross-examining M.S. about his family's statements to the media. [1] We disagree with both contentions.

A. The Evidence Was Sufficient To Support The Court's Finding That A.P. Committed A Second-Degree Assault.

First, A.P. contends that "the evidence was insufficient to sustain the finding of second-degree assault because, at most, the State proved only that A.P. and M.S. engaged in a mutual affray." The State responds that "the evidence was sufficient to . . . sustain the juvenile court's delinquency finding that she committed second-degree assault . . . because the juvenile court's finding . . . was based on the events that transpired after M.S. fell." There were, to be sure, competing theories of who started and escalated this fight, and the

[1] A.P. phrased her Questions Presented as follows:

> 1. Was the evidence sufficient to sustain the finding of involvement as to second-degree assault?
> 2. Did the juvenile court erroneously prevent the admission of relevant evidence?

evidence before the court supported the finding that A.P.'s actions qualified as a second-degree assault.

In assessing the sufficiency of the evidence where a juvenile committed a delinquent act, we 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." *In re Eric F.*, 116 Md. App. 509, 519 (1997). (emphasis in original) (citation omitted). A delinquent act is "an act which would be a crime if committed by an adult," Md. Code (1974, 2013 Repl. Vol., 2016 Supp.), § 3-8A-01l of the Courts and Judicial Proceedings Article ("CJ"), and we look at whether the alleged act could be proven beyond a reasonable doubt by the evidence presented at trial, CJ § 3-8A-18.

The court found that the mutual affray between M.S. and A.P. ended once M.S. fell to the ground and withdrew from the fight and that A.P. committed a second-degree assault by continuing to punch him after that point. An affray is a common law offense defined as "the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people." *Dashielle v. State*, 214 Md. App. 684, 689 (2013) (citation omitted). Second-degree assault, on the other hand, is a statutory crime that encompasses three types of common law assault and battery: "(1) the intent to frighten assault, (2) attempted battery and (3) battery." *Snyder v. State*, 210 Md. App. 370, 380 (2013) (internal quotations omitted). This case focuses on the battery form of assault, which occurs when the defendant imposes intentional or reckless (*i.e.*, not accidental)

offensive physical contact on another without consent. *Hickman v. State*, 193 Md. App. 238, 256 (2010).

When A.P. initially pushed M.S. off of her feet and M.S. proceeded to push her back, M.S. and A.P. were engaged in a mutual affray:

> [COUNSEL FOR M.S.] Okay. So once you sat down the first time, what happened next?
>
> [M.S.] I sat down, I stood up and asked her could she move her feet.
>
> ***
>
> [COUNSEL FOR M.S.] And after you sat down, what, if anything, did you tell her?
>
> [M.S.] Could she move her feet.
>
> ***
>
> [COUNSEL FOR M.S.] What did she say when you told her to move her feet?
>
> [M.S.] She said no, because she didn't like me.
>
> ***
>
> [M.S.] I sat back down, she said if I didn't move, she was going to punch me.
>
> [COUNSEL FOR M.S.] Okay. And what happened after that?
>
> [M.S.] She punched me in my face…and her sister grabbed my collar.
>
> ***
>
> [COUNSEL FOR M.S.] Did you hit her?
>
> ***

[M.S.] Yes.

***

[M.S.] I punched her.

Indeed, M.S. and A.P. both testified as much.[2] Both also testified that the video images displayed A.P. and her sister continually hitting M.S., even though he had stopped hitting A.P. And even after another student broke up the fight, A.P. resumed hitting him.

A.P. counters that the State failed to prove that M.S did not consent to the contact and, therefore, the elements of battery were not met. She relies on *Hickman*, in which we held that a victim who did not back down, and voluntarily went outside to engage in the affray, consented to the contact that followed. *Hickman*, 193 Md. App. at 257. But that case doesn't help her here. Unlike *Hickman*, M.S. *did* back down when he refused to continue responding to A.P.'s punches and held his hands over his head to protect himself. In fact, A.P. acknowledged that even before M.S. was down with his hands over his head, he was moving away from her, and that she moved towards him and continued to hit him.

The court did not err, therefore, in finding that the fight evolved from an affray to an assault, and thus that A.P. was involved. The evidence supported the conclusions that A.P. hit M.S. in an offensive manner when she continuously hit his head while her sister held him down, that M.S. did not consent to this touching as he blocked his head from A.P.'s blows, and that A.P. acted intentionally when she punched M.S. after he violated

[2] A.P.: "I pushed him first. He pushed me and then when he pushed me, my head hit the window. And then that's when I punched him and that's when we started fighting."

her space. A reasoning judge could have relied on the testimony and video evidence to find that A.P.'s actions met the elements of a battery, and therefore a second-degree assault, if an adult had committed them.

B. The Court Did Not Err In Restricting Cross-Examination.

Second, A.P. contends that the court erred by precluding her from cross-examining M.S. about his parents' decision to talk to the local news media about the incident. She contends that this line of inquiry was relevant because it would be bear on the truthfulness of M.S.'s testimony at the merits hearing, that his need to stick to the family's public story drove the substance of his testimony. She also argues that the error was not harmless because the court was the fact-finder. The State responds that the court did not abuse its discretion when it sustained objections to questions about the family's media contacts, and that any error was harmless.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. The standard of review for admissibility of evidence depends on the relevance of the evidence. *See State v. Simms*, 420 Md. 705, 724 (2011). Trial judges generally have wide discretion when weighing the potential relevance of evidence. *Id.* "Our standard of review on a relevancy question depends on whether the ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law." *Parker v. State*, 408 Md. 428, 437 (2009) (citation and internal quotations omitted). Relevance in this instance

turns on the relative materiality and probativity of the proffered questions, not a binary legal question, so the court's decision to exclude them "will not be reversed on appeal [without] a showing of abuse of that discretion." *Brown v. Daniel Realty Co.*, 409 Md. 565, 583 (2009) (citation and internal quotation omitted).

During the hearing, S.P.'s counsel sought to elicit testimony that M.S.'s parents talked to the media about the incident on the bus for the purpose of challenging the truthfulness of M.S.'s testimony. The State objected on relevance grounds and the court sustained the objections:

> [DEFENSE COUNSEL]: When your dad showed up? Okay. And that very same day your parents went to the news media.
>
> [THE STATE]: Objection, Your Honor. Relevance.
>
> [THE COURT]: Sustained.
>
> [DEFENSE COUNSEL]: That same day, a television reporter interviewed you.
>
> [THE STATE]: Objection. Relevance.
>
> [THE COURT]: Relevance?
>
> [DEFENSE COUNSEL]: Your Honor—
>
> [THE STATE]: If we may approach.
>
> [DEFENSE COUNSEL] What happened, his Dad gets this, all three kids are going to be suspended. Apparently, maybe—he says he wasn't suspended. But it's clear from the paperwork that at least initially all three kids were going to be suspended.
>
> Mom and Dad tell [M.S.] that they're going to the news and they go to the news and they get news reports, they get

> internet reports published about he got beat up. And that's why this comes out like it does.
>
> [THE COURT]: I'm not sure the – so who –
>
> [DEFENSE COUNSEL]: So the relevance is bias, for one, because –
>
> [THE COURT] What do you mean, bias?
>
> [DEFENSE COUNSEL] Bias. Bias is any reason to testify untruthfully against a person. He's been locked in this –
>
> [THE COURT] He made a statement even before all this happened. Right? The Exhibit that you used. Even before the media was involved, he alleged that your two respondents beat him up.
>
> ***
>
> [DEFENSE COUNSEL] I mean, I agree that it's relevant, he's just basically had his story from the early days, because they went to the news –
>
> [THE COURT] They did what?
>
> [DEFENSE COUNSEL] Because they went to the news, there could be possible suspensions, talked to witness' parents, now he's had to maintain that story.
>
> [THE COURT] But that was the story from the beginning.

We discern no abuse of discretion here. S.P. and A.P. hoped, presumably, that revealing the family's decision to speak to the press would "establish why M.S.'s testimony at the merits hearing should have been taken with a proverbial grain of salt." The premise of the argument is dubious—as the court found, M.S. maintained the same story before and after the media were involved. Far from establishing bias, cross-examining the child victim

about remarks his family made to the media seem only to introduce speculation about his and his family's motives in pursuing charges, not in the truthfulness of what he said at any point in the process. Accordingly, the court did not err in sustaining the State's objections.[3]

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

[3] And even if we were to assume that the court abused its discretion in doing so, any error was harmless. An error is harmless if "a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict." *Dorsey v. State*, 276 Md. 638, 659 (1976). Whatever this line of attack might have accomplished for A.P., it couldn't have undermined the testimony of both participants about the fight or the corroborating video evidence that formed the basis of the charge and the court's ultimate finding.