Circuit Court for Prince George's County
Case No. JA-20-0185

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1019

September Term, 2021

IN RE: O.M.

Reed,
Friedman,
Albright,

JJ.

Opinion by Friedman, J.

Filed: July 25, 2022

The Circuit Court for Prince George's County, sitting as a juvenile court, found O.M. involved in delinquent acts that could constitute the crime of second-degree assault if they had been committed by an adult. O.M. noted a timely appeal to ask us to consider whether the juvenile court erred by (1) denying her motion to sequester witnesses during opening statements; and (2) treating perfect self-defense as an element of the crime of mutual affray. We reject her arguments and affirm the finding of delinquency.

BACKGROUND

After school, two groups of teenagers met at a McDonald's restaurant. The larger group, which included O.M., asked the smaller group, which included A.F., to leave. When the smaller group left the restaurant, the larger group followed. Some back and forth between the two groups ensued. Eventually, O.M. told A.F., "I just want to fight you." Although A.F. initially attempted to avoid the fight, she ultimately put her "guards up" in anticipation of a fight.[1] A.F. and O.M. then swung their fists at each other simultaneously. A.F. fell to the ground after O.M.'s first or second punch after which O.M. punched A.F. another eight or ten times in rapid succession before O.M. was pulled away by one of the spectators.[2] A.F. was knocked unconscious and suffered a broken jaw, broken nose, and a concussion. The juvenile court found O.M. involved in second-degree assault.

[1] At the hearing, O.M.'s counsel asked A.F. to demonstrate "what that looks like." The juvenile court helpfully described her action as "[s]he just put her dukes up so she's preparing to go."

[2] A.F. was unable to describe the fight in her testimony. Our account is from a video of the fight recorded by a spectator, uploaded to social media, and subsequently admitted into evidence.

ANALYSIS

I. SEQUESTRATION OF VICTIM

O.M. first argues that the juvenile court erred by allowing A.F. to remain in the courtroom during the State's opening statement.[3]

Our Rules of Practice and Procedure require (with certain exceptions) the mandatory sequestration of witnesses upon request so that they cannot hear the testimony of other witnesses. This is set forth in Maryland Rule 5-615(a), which provides that "upon the request of a party made before testimony begins, the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." MD. R. 5-615(a). The purpose of the rule is to prevent witnesses "from being taught or prompted by each other's testimony," and thereby creating "an artificial harmony of all the testimony." *Poole v. State*, 207 Md. App. 614, 622 (2012) (quoting *Tharp v. State*, 362 Md. 77, 95 (2000)).

As is clear from the text of Rule 5-615(a), however, it applies only to witness testimony and does not apply to other parts of a hearing or trial.[4] For all other parts of a

[3] The State argues that O.M. failed to preserve this issue first by acquiescing in the ruling when it was initially made and later by not re-raising the issue before A.F. testified. Although the State makes forceful arguments, we find the record unclear. For purposes of this opinion, we shall assume without deciding that O.M. preserved the argument and exercise our discretion to consider the merits of O.M.'s argument. *See* MD. R. 8-131.

[4] Because the Rule itself does not apply to opening statements, neither do its exceptions. Thus, we need not consider the application of Rule 5-615(b)(5), which provides in pertinent part that a "court shall not exclude pursuant to … Rule [5-615(a)] … a victim of … a delinquent act…to the extent required by statute." MD. R. 5-615(b)(5). We also note that the relevant statute, section 3-8A-13(f)(2) of the Courts and Judicial Proceedings ("CJ") article, is not inconsistent with Rule 5-615(b)(5), providing that "[i]n any proceeding in which a child is alleged … to have committed a delinquent act … the court

hearing or trial—especially here, opening statements—the decision whether or not to require the sequestration of witnesses is committed to the sound discretion of the court. 6 LYNN MCLAIN, MARYLAND EVIDENCE, STATE & FEDERAL § 615:1a (2015, August 2021 update) (trial court may "order witnesses to leave the courtroom before the giving of counsel's opening statements[,]…the question of timing is to be resolved by the trial court in its discretion."); *U.S. v. Brown*, 547 F.2d 36, 37 (3d Cir. 1976) ("The decision as to whether witnesses should be excluded prior to counsel's opening statements is committed to the discretion of the [trial] court."). In reviewing whether the court abused this discretion, we look at the underlying facts to see whether a party was prejudiced by the decision not to require sequestration. *Hurley v. State*, 6 Md. App. 348, 351-52 (1969) (per curiam); *Johnson v. State*, 21 Md. App. 214, 220 (1974), *rev'd on other grounds*, 274 Md. 536 (1975) (holding that, in the absence of any prejudicial effect, the trial court did not err in failing to sequester witnesses prior to opening statements).

O.M. has not pointed to any facts, and our careful review of the record does not disclose any, that suggest that she was prejudiced by A.F. being permitted to remain in the courtroom during the State's opening statement. We see nothing in the State's abbreviated opening that would have or even could have influenced A.F.'s testimony. It is, in fact, much more likely that the State's opening was derived from A.F.'s report of the fight rather

may exclude the general public from a hearing, and admit only the victim and those persons having a direct interest in the proceeding" CJ §3-8A-13(f)(2) (emphasis added). That is, although the court may (or may not) exclude the general public, it may not exclude the victim.

than the reverse. And, critically, the video of the fight independently corroborated A.F.'s account. There is simply no evidence that A.F. altered her testimony in response to the State's opening statements. We therefore conclude that the juvenile court did not abuse its discretion in declining to sequester the victim, A.F., during opening statements.

II. MUTUAL AFFRAY

O.M.'s second contention is that the juvenile court misunderstood or misapplied the elements of the crime of mutual affray—a consensual fight in a public place—that she had raised as a defense. Specifically, O.M. argues that the juvenile court erred as a matter of law by considering the necessary level of force, thereby adding an element to the crime of mutual affray. We reproduce in full the juvenile court's statement:

> Your defense in this case appears to be that you acted in self-defense or in a mutual affray or however your lawyer defined that. I mean, self-defense can be a defense to an assault charge under certain circumstances. While there is no evidence whatsoever regarding your agreement to this fight and whatever evidence that does exist, indicates that the victim, whose intent was not to engage in a fight, and that's what she testified to, arguably, the fact that she threw a punch at you simultaneously with the punch that you threw, is some evidence that she consented to the initial contact.
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> So the first punch presents to the Court a question of fact. But there is no consent or no question as to consent regarding the remaining blows, and as I recall, there were eight, give or take a few, I don't remember how many blows you threw while she was on her back. ***A person loses the right to self-defense regarding all the remaining punches that you threw because a person must employ force that is reasonably necessary to defend themselves against any harm or threats.***
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> In this particular case, she is on her back, and you were continuing to wale on her. You can't assault people while they lay on their back defenseless. So the Court finds involved as to second-degree assault.

(emphasis added).

O.M. misunderstands the juvenile court's ruling. The juvenile court was not making a legal ruling. Rather, the juvenile court held—as a matter of fact—that the fight was made up of two separate incidents. The first incident—which began when O.M. and A.F. squared up and threw simultaneous punches and ended when A.F. fell to the ground unconscious—was a mutual affray in which O.M. was arguably acting with consent and in self-defense, and, as a result, the court did not find O.M. involved in that incident. The second incident—which began with A.F. knocked unconscious and laying flat on her back while O.M. continued to pummel and "wale on her"—was, as the juvenile court found, a second-degree assault. We see nothing wrong with this factual determination, certainly nothing that would rise to the level of an abuse of the juvenile court's discretion as a factfinder, and affirm.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, SITTING AS A JUVENILE COURT, AFFIRMED; COSTS TO BE PAID BY APPELLANT.