Circuit Court for Baltimore City
Case No. 318129011

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1253

September Term, 2019

In Re: S.B.

Meredith,
Reed,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Reed, J.

Filed: August 20, 2020

On May 9, 2018, S.B. ("Appellant") was charged with a five-count juvenile petition, filed in the Circuit Court for Baltimore City, sitting as a juvenile court with attempted robbery, conspiracy to commit robbery, two counts of attempted theft and assault. After an adjudication hearing before the magistrate, Appellant was found "facts-not-sustained" on all counts. The magistrate believed the testimony of the defense witness over the testimony of the State witness, and therefore, decided that the State had failed to prove its case beyond a reasonable doubt. The State filed an exception, and the circuit court reversed the magistrate's findings, determining that the magistrate erred in granting a motion of acquittal during the adjudicatory hearing and finding facts not sustained on the second-degree assault charge. The circuit court remanded the case back to the juvenile court, instructing the magistrate to continue the adjudicatory hearing as to Appellant's case and to consider all of the charged offenses in ruling on the case. At the second adjudication hearing, the magistrate again found that none of the Appellant's charges were facts sustained, and recommended dismissal. The State file a second exception, and the circuit court found Appellant facts sustained as to attempted robbery, conspiracy to commit robbery, second-degree assault and being in or on a motor vehicle with intent to commit theft. Appellant filed a motion for reconsideration, which was denied. This appeal followed, wherein Appellant presents two questions for our review, which we have condensed and rephrased for clarity:[1]

[1] Appellant presents the following questions:

1. Did the circuit court violate S.B.'s due process right when, without observing the live testimony of the witnesses at S.B.'s juvenile delinquency adjudication, it

I. Did the circuit court err when it overruled the magistrate's determinations and found that the facts were sustained?

For the reasons explained below, we affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

The Adjudication

At the adjudication hearing on July 3, 2018, John McDaniel ("McDaniel") testified that on the morning of May 4, 2018, at approximately 10:55 am, he had been working on the sixth floor of a building when he went to go retrieve tools from the 2001 Dodge Ram pickup truck he was borrowing, located in the parking garage. He mentioned that as he walked to his vehicle, he didn't see anyone, but as he stood in the open doorway on the passenger side of the truck, he saw three young-looking African American males, whom he identified in court as T.N., K.R., and Appellant, running around the truck. McDaniel indicated that a "heavyset, African American youth in a dirty white tee shirt, identified as T.N., surprised [him] from behind" and began "punching [him] in the face." McDaniel noted that while he was pinned against the inside of the vehicle, K.R., who was wearing a gray hoodie, entered the backseat of his vehicle and also began "[r]rummaging through the

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rejected the magistrate's assessment of the credibility of that testimony and found the State met its burden of proof, contrary to the magistrate's recommendation?

2. Did the circuit court abuse its discretion when, without hearing live testimony, it failed to apply the clear-error standard to the magistrate's findings of fact, including its credibility determinations; rejected the magistrate's conclusion that the State failed to produce sufficient evidence in S.B.'s case; and found the State had met its burden of proof?

truck" and, "punching him in the head." The third individual, identified as Appellant, was noted as wearing an orange, horizontally striped shirt, and McDaniel stated he was also rummaging in the open truck bed, hitting McDaniel in the head.

During the assault, McDaniel testified that he was "very aware" of each of the juveniles, because he was afraid that they would pull out a weapon. McDaniel noted that he yelled for help and was able to push T.N. away to escape from the truck, but that then the third juvenile circled around the front of the truck and began attacking McDaniel from behind. Eventually, McDaniel testified that he was able to "gain[] some distance" and the three juveniles took off running and he ran after them, calling the police. McDaniel suffered hematoma in his right eye and other bumps and bruises, and at the time of the trial, he was still seeing a doctor regarding possible nerve damage to his eye.

Surveillance cameras were located throughout the garage and loading dock. The footage from the cameras at the loading dock on the ground level and on the ramp leading from the ground floor to the second floor were entered into evidence by the State. While the footage showed T.N., K.R. and Appellant entering and moving about the garage prior to the incident, running in the direction of the exit after the incident and McDaniel appearing shortly afterwards on the phone, there was no surveillance of the actual incident. McDaniel also noted that nothing was taken from his person or the truck. McDaniel acknowledged that he was mistaken about the color of the sweater K.R. was wearing, when the video tape revealed that the hoodie was maroon. Further, it was unclear from McDaniel's testimony whether Appellant or K.R was in the truck bed or the other way around, given that on the video, McDaniel identified Appellant as the juvenile in the

backseat wearing an orange striped shirt and K.R. as the juvenile in the truck bed wearing a hoodie. However, initially, he stated on direct examination that the person in the backseat was wearing a hoodie. Even so, McDaniel maintained that both Appellant and K.R. "rummaged" through the cab and the bed of the truck.

On cross-examination, McDaniel testified that he thought that they were "just kids it looked like at the time running around just playing." He noted that when the kids got around his vehicle, he asked who he had identified as T.N. "if the truck parked next to me was his," and T.N. responded by punching him in the face, unprovoked. McDaniel denies that he provoked the assault by using a racial slur, indicating that he "do[esn't] speak that way to anybody." He also acknowledged that when he gave his police report, he did not indicate that the person in the bed of the truck assaulted him, but at the time of trial, he was sure that all three boys had assaulted him.

At the close of the State's case-in-chief, Appellant, along with T.N. and K.R. moved for a judgment of acquittal on all counts. The magistrate granted the motion on all counts for each defendant except for second degree assault, finding that there had been no evidence that there was an attempted taking. In considering the testimony, the magistrate found that, viewing the evidence in the light most favorable to the State, there was no evidence that any of the juveniles were rifling through the truck.

T.N. testified for the defense and stated that he and his friends were in the parking garage because "[his] friend said he had never been to the top of the parking garage." T.N. explained that as they were going up the ramp, he dropped a dollar bill over the side and they climbed down the ramp to look for the dollar bill. As they were searching, they

"walked around the part where [McDaniel] was standing." T.N. indicated that they saw McDaniel and walked around his vehicle looking for the dollar bill, which they found underneath the truck parked next to McDaniel's truck. At this point, T.N. explained that McDaniel asked T.N. if the vehicle was his and T.N. responded no. According to T.N., McDaniel turned back around and said, "black bitch." T.N. stated that he turned and asked McDaniel to repeat himself, and McDaniel did not reply. T.N. testified they continued to walk away, and T.N. again heard McDaniel say "black bitch." T.N. stated that the remarks made him "angry," and so he punched McDaniel in the face, causing McDaniel to fall in his truck and be pinned within the open door. T.N. elaborated that as he continued to hit McDaniel, K.R. and Appellant ran away, which was consistent with the surveillance clip, as T.N. is the last of the three boys to leave the garage. T.N. stated that McDaniel then grabbed him by his hair, preventing him from leaving, but T.N. pushed him and ran away, following his friends, as McDaniel yelled that he was calling the police. T.N. admitted on cross-examination that he never told the police that McDaniel called him a "black bitch."

In closing arguments, both parties focused on the credibility of the witnesses. Particularly, the State asked that the magistrate value the testimony of McDaniel over the testimony of T.N., arguing that "[T.N.'s] testimony has been tailored in such a way to absolve himself and try to mitigate his assault on [McDaniel] by arguing, I assume, fighting words, that [McDaniel] provoked him in such a matter that he simply lost control and went berserk …." The State maintained that T.N. "[was] not a credible witness." Appellant's defense counsel, along with K.R.'s and T.N.'s defense counsel, asked that the court believe

T.N.'s testimony over McDaniel's, pointing to various inconsistencies in McDaniel's testimony between direct and cross examination, stating:

> At one point on direct examination he was testifying that [Appellant] was in the back of the truck rummaging and that [K.R.] was the one that was apparently grabbing him and punching him and upon cross examination the testimony switched. That happened several times.
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> The description of my client and Mr. Smuck's client [K.R.] switched on a number of occasions making it difficult to understand which one was which. He said he could see all three yet all three individuals yet in the description and the way that he described the situation it was clear that whoever was the person in the back rummaging you couldn't see that person.
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> And he clearly on direct examination testified one way and on cross testified another. If the court were to believe, and I think it should, the credibility of [T.N.], what we are talking about is is [sic] that [T.N.'s] situation is one where he was provoked by this gentleman.
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> His testimony is that he was the one who punched the individual several times. I think that, you know, in this day and age and in this situation it's a shame that these type of things happen. But I agree with Mr. Gross that in this it was a mutual affray.
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> This was a situation between [T.N.] and [McDaniel] where they were in the garage. He got on the stand. T.N. got on the stand and admitted that he punched [McDaniel], admitted that he punched him several times.

The magistrate found that the facts were sustained on the second-degree assault charge as to T.N., but not against Appellant or K.R. The magistrate was clear in saying, "I believe [T.N.'s] testimony" and "found [T.N] to be a very credible witness," but determined that "the biggest problem he found with McDaniel's description of the assault was that "it came out of the blue …." The magistrate explained that he could not "find beyond a reasonable doubt that that's what happened." While the magistrate rejected the arguments by all three defense counsel that it was a mutual affray, he did note that he could

not find beyond a reasonable doubt that K.R. and Appellant were involved in the assault. The court observed that T.N. "said there was no involvement of K.R. and Appellant, [McDaniel] says there was[,]" and he "believed [T.N.'s] testimony."

On August 2, 2018, the magistrate issued a written order, dismissing all counts against Appellant because the State failed to meet its burden of proof regarding the robbery, theft and assault allegations, stating "the evidence was not sufficient to sustain the charge(s)." The order echoed the magistrate's oral ruling, outlining his reasoning for finding Appellant facts not sustained for the assault. The order elaborated that the magistrate believed T.N.'s testimony that he struck McDaniel because T.N. was "upset and he acted immediately" and that K.R. and Appellant were not involved because they "had no way of knowing he was going to do that and they had no way of intervening and they had no way of planning."

The State's First Exception

The State filed an exception to the magistrate's recommendations of Appellant being found facts not sustained[2] on all charges. The State asserted that motions for judgment of acquittal are not authorized in juvenile proceedings and that given the evidence presented, the magistrate should have found Appellant facts sustained. An exceptions hearing was held on October 5, 2018 and November 9, 2018, and the circuit court judge reviewed the transcript of the adjudication hearing and viewed the surveillance video, in

[2] The State filed a similar exception in K.R.'s case. Although T.N. was also found "facts not sustained" on the attempted robbery and theft counts, the State did not file an exception in his case.

addition to hearing arguments of counsel. Appellant maintained that the magistrate's determination was based on a credibility issue of the complaining witness and that the circuit court judge should observe the live testimony in order to assess the credibility of the witness.

After its opportunity to review the transcript of the adjudication hearing and the surveillance video, the circuit court remanded the matter, finding that there was no provision for motions for judgment of acquittal in juvenile court, citing Title 11 of the Maryland Rules, Md. Rule 1-101(b) & (d), and case law. The circuit court determined that even if such a motion was recognized, the State presented sufficient evidence to withstand the motion, "when considering the evidence in light most favorable to the State." The circuit court did not rule on the assault charge, but instead, remanded the case so that the magistrate could receive additional testimony, beyond the motion for judgment of acquittal, with respect to the assault charge. Additionally, the circuit court inquired about the magistrate's credibility determination, stating, "[e]ven if the Magistrate found the third co-respondent [T.N.] credible, how does that apply to the other two respondents [K.R. and Appellant.]?" In remanding, the circuit court instructed the Magistrate to consider "all of the charged offenses in ruling on the case."

Adjudication Hearing on Remand

The hearing on remand was held on February 13, 2019. Appellant did not offer any evidence on remand. His counsel reiterated that McDaniel was not a credible witness, and that the magistrate needed to clarify how McDaniel's lack of credibility contributed to his determination of "facts not sustained" on all charges for Appellant. The State asserted that

T.N.'s testimony about dropping a dollar bill was not supported by the surveillance video, and consequently, his testimony was not trustworthy. After arguments from both parties, the magistrate declared that the State had still failed to prove beyond a reasonable doubt the elements of each of the charges. The magistrate elaborated that he "believed [T.N.] because his testimony was 'clear,'" and found McDaniel's testimony "by and large, to be credible." However, the magistrate expressed "problems" with McDaniel's testimony that T.N.'s attack came "out of the blue." In discussing the key matter of what prompted the assault, the magistrate found that "[McDaniel] had called [T.N.] this … racially offensive name, and that that's what resulted in [T.N] hitting him. Frankly, I am unable to find why [McDaniel's] version should be believed as opposed to [T.N.'s] version." The magistrate explained that "I just wasn't able to find [McDaniel]'s testimony such that it overcame the credibility of [T.N.'s] testimony and therefore, since I was unable to do that, I am unable to find beyond a reasonable doubt."

In his written order, the magistrate further clarified his credibility determination as it pertained to Appellant and K.R., writing:

> On the issue of whether [Appellant] and [K.R.] had contact with the truck being used by [McDaniel], I was unable to resolve the discrepancy between [T.N.'s] testimony and [McDaniel's] testimony.

Because the magistrate was unable to make a factual determination as to whether Appellant or K.R. had any contact with the truck, the magistrate was "unable to find beyond a reasonable doubt, facts sustained on any of the [robbery or theft] counts." While the magistrate did acknowledge the State's argument that a "reasonable inference" could be drawn that "the respondents were up to no good when they entered the garage," the

magistrate declined to draw other inferences that the State maintained were supported by McDaniel's testimony. In reference to the respondents' flight from the scene, the magistrate emphasized that they "may have been running because they had committed an offense, or they may have been running because their companion committed an offense and they didn't want to get into trouble. Both are plausible inferences." The magistrate also wrote that he believed T.N.'s testimony that "neither Appellant nor K.R. struck or touched [McDaniel]," adding that "[w]hile it is possible that [McDaniel's] testimony more accurately portrayed what happened than [T.N.'s] testimony, I found [T.N.'s] testimony to be more persuasive." The juvenile court rejected the State's accomplice theory, asserting:

> [T.N.] struck [McDaniel] spontaneously when [McDaniel] called him a "black bitch." There is no evidence that either [Appellant] or [K.R.] expected this … They did not act in concert with [T.N.]. They did not assist [T.N.] There is not enough evidence to find, beyond a reasonable doubt, that either … assaulted [McDaniel].

The magistrate recommended that the court find facts not sustained on the second-degree assault charge.

The State's Second Exception

The State filed a second exception to the magistrate's recommendation, requesting that the circuit court review the evidence presented and the magistrate's basis for his facts not sustained determinations. In his reply, Appellant's counsel focused their argument on the fact that the circuit court did not observe the witnesses' live testimony, "the court must defer to the magistrate's finding of fact, especially of credibility," and noted that failure to do so would be a violation of the Appellant's due process rights. On April 25, 2019, the

circuit court heard arguments on the State's exceptions, and issued a written ruling where the circuit court made the following significant findings:

> a. The [surveillance] video showed that T.N., K.R. and Appellant were working together, based on the way they entered and moved about the garage;
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> b. T.N.'s testimony about dropping a dollar bill over the ramp was not credible because the surveillance did not show him dropping anything and did not show them looking for it. In addition, the circuit court reasoned that if that was the case, then there was no need for them to go further into the garage if they had just dropped it over the wall; and
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> c. McDaniel's testimony was supported by the juveniles' "furtive, stealth-like movements," which were "collaborative and coordinated," and by their "flight from the garage just before McDaniel."

In discussing the magistrate's credibility determination, the circuit court wrote, "[w]hether [McDaniel] called [T.N.] a racially offensive term, which purportedly precipitated a separate assault[] is not part of this Exception regarding [Appellant] and [K.R.]." The circuit court also noted that he did find McDaniel's testimony credible with respect to the allegations of attempted robbery, which the magistrate was inconclusive about.

Therefore, "based upon the testimony of [McDaniel] and the video clips," the circuit court found beyond a reasonable doubt that [Appellant] and [K.R.] "did use force and or [sic] threat of force to attempt to rob and to conspire to rob" McDaniel. The circuit court also held that the juveniles did "[get] on the truck bed and/or in the truck cab with the intent to steal from [McDaniel]." An order of facts sustained was entered against Appellant on the counts of attempted robbery, conspiracy to commit robbery, second-degree assault and being in or on a vehicle with the intent to commit theft. However, the circuit court declined

to speculate about the value of the property the juveniles were attempting to steal, stating there was "no evidence of exactly what [Appellant] was attempting to steal," and found facts not sustained on the attempted theft count. Appellant sought reconsideration, which the circuit court denied. Accordingly, Appellant was adjudicated delinquent and placed in the care and custody of the Maryland Department of Juvenile Services. This timely appeal followed.

DISCUSSION

A. Parties' Contentions

Appellant asserts that the circuit court's reversal of the magistrate's credibility determination without seeing the live testimony violated Appellant's due process rights. In the alternative, Appellant maintains that the circuit court abused its discretion when it rejected the magistrate's determination that the State failed to meet its burden of proof. Specifically, the Appellant argues that the circuit court should have reviewed the magistrate's "outcome-determinative" credibility findings for clear error. The State rebuts, declaring that the circuit court did not reject the magistrate's credibility findings, and those findings did not dictate the outcome of the attempted robbery and related charges against the Appellant. The State outlines that the circuit court defers to the magistrate's factual findings unless clearly erroneous but makes its own determination of the meaning of those facts, and the circuit court properly made an independent determination on the facts before it in this case.

B. Standard of Review

In *McAllister v. McAllister*, we outlined:

> When reviewing a master's report, both a trial court and an appellate court defer to the master's first-level findings (regarding credibility and the like) unless they are clearly erroneous. On the other hand, the reviewing courts give less deference to conclusory or dispositional findings[.] Finally, while the circuit court may be "guided" by the master's recommendation, the court must make its own independent decision as to the ultimate disposition, which the appellate court reviews for abuse of discretion.

McAllister v. McAllister, 218 Md. App. 386, 407 (2014) (internal citations omitted). However, we apply the *de novo* standard of review to alleged violations of due process under Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the United States Constitution. *See Regan v. Bd. of Chiropractic Examiners*, 120 Md. App. 494, 509 (1998), *aff'd sub nom*. *Regan v. State Bd. of Chiropractic Examiners*, 355 Md. 397 (1999) (citing *Liberty Nursing Ctr., Inc. v. Dep't of Health & Mental Hygiene*, 330 Md. 433, 443 (1993)).[3]

[3] As a preliminary matter, we reject Appellant's due process argument with respect to the circuit court's reversal of the magistrate's determinations. We acknowledge that juveniles facing delinquency adjudications are entitled to hearings with procedures that ensure "fundamental fairness" and reliable factfinding. *In re. Thomas. J.*, 372 Md. 50, 65-66 (2002). However, we dismiss the notion that Appellant did not receive such a hearing or that he was deprived of due process either under the Fourteenth Amendment to the U.S. constitution or pursuant to Article 24 of the Maryland Declaration of Rights. As discussed at length *infra*, the circuit court was neither required to defer to the magistrate's recommendations, nor mandated to listen to live testimony. *See Wenger v. Wenger*, 42 Md. App. 596, 608 (1979) ("The appellant's contention that a [circuit court] must listen to the recorded testimony of the proceedings or read a transcript of the proceedings before the [magistrate] in its entirety is without any support in law."). Additionally, while the United States Supreme Court has cautioned that "court must always be sensitive to the problems of making credibility determinations on the cold record," they have held that such determinations absent live testimony are not violations of due process. *See United States v. Raddatz*, 447 U.S. 667, 678 (1980).

C. Analysis

As outlined in Md. Rule 11-111(a)(2), "[a] magistrate is authorized to hear any cases and matters assigned to [them] by the court[,]" including juvenile adjudication proceedings. Once the hearing has been held, the Magistrate then submits a "written report of his proposed findings of fact, conclusions of law, recommendations and proposed orders with respect to adjudication and disposition." Md. Rule 11-111(b). However, "[t]he findings, conclusions and recommendations of a magistrate do not constitute orders or final action of the court." Md. Rule 11-111(a)(2). A party may file an exception to the magistrate's proposed findings, and a hearing on those exceptions shall be on the record, and "limited to those matters to which exceptions have been taken." Md. Rule11-111(c).

This Court has traditionally given great deference to the findings of facts by a magistrate, or a "Master," as they were previously called, since they are the ones who hear the witness, observe the demeanor of the witnesses and can make the best determiniation about credibility. *See Wenger*, 42 Md. App. at 604. However, this deference only applies to "first-level" facts. *Levitt v. Levitt*, 79 Md. App. 394, 398 (1989). First-level facts "are those that answer the What?, Where? and How? questions." *Levitt,* 79 Md. at 398. "Second-level" facts, on the other hand, are the "ultimate conclusions drawn from the first-level facts[,]" and "[d]eference is not accorded to 'second-level' facts or to recommendations." *Id*. For example, we stated in *Levitt* that:

> A first-level fact would be that one or both parents used drugs. A second-level fact would be that that use did or did not affect [the child]. A recommendation would be a change or lack of change of custody.

Levitt, 79 Md. App. at 398. In *Wenger*, Judge Moylan outlined that the "Chancellor," the one who reviews the recommendations made by the magistrate (presently known as the circuit court), can defer to the magistrate on first-level facts. *Wenger*, 42 Md. App. at 607. Nevertheless, because second-level facts "are dispositional in nature [,] [they] are the ultimate province of the chancellor." *Id*. This is because a magistrate is more "ministerial" in nature and is not invested with any judicial power. *State v. Wiegmann*, 350 Md. 585, 593 (1998).

The magistrate's sole responsibility is to establish the first-level facts, which would in fact include an assessment regarding credibility of the witnesses. *Levitt*, 79 Md. App. at 399. Nevertheless, the circuit court is free to disregard the conclusions the magistrate draws from its first-level fact finding, as it's the "[circuit court's] responsibility, not the [magistrate's], to determine finally the parties' rights." *Id*. As we have explained, "[w]hile the circuit court may be 'guided' by the [magistrate's] recommendation, the court must make its own independent decision as to the ultimate disposition." *McAllister*, 218 Md. App. 386, at 407 (citations omitted).

With respect to this Court's review of the circuit court's factual findings as they relate to the circuit court's review of the magistrate's findings of fact, we have held that:

> When an appellate court, absent clear error, defers to a trial court, it defers not only to the fact-finding but to any legitimate verdict, disposition or judgment emanating from that fact-finding. The function of the chancellor vis-à-vis the master is quite different. . . .

> Where he chooses to rely exclusively upon the report of the master, . . . he should defer to the fact-finding of the master where that fact-finding is supported by credible evidence and is not, therefore, clearly erroneous. *The chancellor, however, (unlike the appellate court) always reserves unto himself the prerogative of what to make of those facts–the ultimate disposition of the case.*

In re Danielle B., 78 Md. App. 41, 58-59 (1989) (quoting *Wenger*, 42 Md. App. at 602) (emphasis in *Danielle B.*). Hence, even though the circuit court evaluates the magistrate's first-level findings of fact for clear error, the circuit court then "make[s] its own judgment of what those facts mean." *Danielle B.*, 78 Md. App. at 58. And still, "If any competent material evidence exists in support of the [magistrate's] factual findings, those findings cannot be held clearly erroneous." *Figgins v. Cochrane*, 403 Md. 392, 409 (2008) (citation omitted). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Kusi v. State*, 438 Md. 362, 383 (2014) (citation omitted). On appellate review, we also defer to the magistrate's "first-level" fact findings, absent clear error, *see McAllister*, 218 Md. at 407, but as stated *supra,* we review the circuit court's independent decision as to the final disposition for abuse of discretion. Usually, we do not find abuse of discretion unless the circuit court's decision is "well removed from any center mark imagined by the reviewing court and beyond the fringe of what the court deems minimally acceptable." *North v. North*, 102 Md. App. 1, 14 (1994)).

In his Order dated February 19, 2019, the magistrate made the following "findings of facts":

1. The two respondents and the co-respondent were in the garage at the time of the assault;

2. All three respondents ran from the garage after the assault occurred;

3. McDaniel correctly identified Appellant and K.R. as the young men who were with T.N. in the garage when T.N. assaulted him;

4. T.N. struck McDaniel in the face and injured him;

5. No property was taken from McDaniel;

6. Concerning his credibility findings, the magistrate believed T.N's testimony that he struck McDaniel because McDaniel called him a racial slur;

7. There is no evidence that Appellant or K.R. expected T.N. to hit McDaniel;

8. Appellant and K.R. were surprised when T.N. hit McDaniel;

9. Appellant and K.R. neither acted in concert with T.N. nor assisted T.N.; and

10. Neither Appellant nor K.R. had any physical contact with McDaniel.

The magistrate was unable to make a factual determiniation as to whether Appellant or K.R. had any contact with the truck being used by McDaniel. The magistrate therefore concluded that he was unable to find, beyond a reasonable doubt, facts sustained on any of the counts of second-degree assault, robbery, attempted robbery, theft, and attempted theft.

The circuit court, by contrast, reviewed the surveillance video from the garage and the transcripts of the testimony and determined that the respondents' "furtive, stealth-like movements" along with their flight from the garage before McDaniel appeared on the video supported McDaniel's testimony about the attempted robbery. In rejecting T.N.'s testimony about why he and the respondents were near McDaniel, the circuit court made an independent determiniation that Appellant and K.R. used force or threat of force to

attempt to rob McDaniel, and they were in fact on the truck bed and/or truck cab with the intent to steal, consistent with McDaniel's testimony. The circuit court disregarded the magistrate's finding that McDaniel provoked the assault by calling T.N. a racial slur, stating that "[w]hether McDaniel called T.N. a racially offensive term, which purportedly precipitated a separate assault is not part of this exception."

This Court acknowledges the difficulties found in distinguishing between "first-level" findings of facts, which are owed great deference, and "more abstract, second-level, conclusory or dispositional facts[,]" which are owed no deference. *Domingues v. Johnson*, 323 Md. 486, 494 (1991). In *Ellsworth v. Sherne Lingerie, Inc*., the Court of Appeals discussed the meaning of the phrase "factual finding," detailing:

> The line between "fact" and "opinion" is often difficult to draw. An investigating body may hear diametrically opposed testimony on the question of whether one person or another struck the first blow, and proceed to decide the issue as a finding of "fact." That determination necessarily has a judgmental quality, and differs, for example, from a finding of fact that a certain number of persons suffered burns from ignition of clothing fabric during a given period. Conclusions found in reports need not be judgmental. A conclusion that there has been a significant increase in fabric-related burn injuries is essentially factual if the datum shows a 60% increase. Thus, attaching labels of "fact" or "opinion" or "conclusion" will not necessarily resolve the issue, and careful attention must be given to the true nature of the statement and the totality of circumstances bearing on the ultimate issue of reliability.

Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581, 609 (1985). Further, "[w]hile the system of resorting to [magistrates] is one of long standing and undoubtedly has salutary effects resulting in the more expeditious dispatch of the judicial process, the system cannot supplant the ultimate role of judges in the judicial process itself." *Wenger*, 42 Md. App. at 603 (quoting *Ellis v. Ellis*, 19 Md. App. 361, 365 (1973)). Typically, "[t]o reverse the

[circuit court], we must conclude that the [magistrate's] first-level fact finding could lead to only one conclusion." *Levitt*, 79 Md. App. at 400.

Assault Count

With respect to the assault count, we find that the circuit court abused its discretion. The Magistrate found, factually, that T.N. assaulted McDaniel because he called T.N. a racial slur and, based on T.N.'s testimony, Appellant never touched McDaniel and was not complicit with T.N.'s assault on McDaniel. However, without addressing the challenge of whether McDaniel called T.N. a racial slur or if the magistrate's findings were clearly erroneous in any regard to the assault, the circuit court found that Appellant and K.R. did "use force and or threat of force to attempt to rob" McDaniel, citing McDaniel's testimony and the respondents' "stealth-like movement" and flight from the garage right before McDaniel emerged on the surveillance video. We disagree with the State that in making this determiniation, the circuit court did not reject the magistrate's credibility determiniation, which is due deference as a first-level fact finding. As the Court of Appeals has held, "[w]e give 'due regard to the fact finder's findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *State v. Suddith*, 379 Md. 425, 430 (2004) (quoting *Moye v. State*, 369 Md. 2, 12, 796 A.2d 821 (2002)).

The magistrate's fact finding about whether Appellant assaulted McDaniel should have been "presumed correct and rejected only if unsupported by the record or otherwise clearly erroneous." *Domingues*, 323 Md. at 494. While the circuit court does make a "independent determiniation" about what those facts mean, or what the final disposition

should be from the magistrate's first-level fact finding, there was only one conclusion that could follow the magistrate's determiniation that he believed T.N.'s testimony that Appellant did not touch McDaniel and was not a part of T.N.'s assault on McDaniel: Appellant did not assault McDaniel. Even though the circuit court did repeat the magistrate's findings, he made no acknowledgment of whether the magistrate's recommendation was in accord with the facts, pursuant to *Wenger, Danielle B. and Domingues*. In reviewing the cold record and surveillance video, but no live testimony, the circuit court simply stated that it believed McDaniel's testimony regarding the allegations of the robbery and that the "force or threat of force is attributed to the three against one scenario and [T.N.] hitting and pinning [McDaniel] to the truck." The circuit court takes no notice of the magistrate's credibility determiniation regarding T.N.'s testimony concerning the assault.

Additionally, we note that the circuit court erroneously failed to consider the magistrate's factual finding that McDaniel called T.N. a "black bitch," which T.N. testified triggered his sole assault on McDaniel, declaring that "it was not part of the exception." This assertion is simply incorrect. When the State filed its exception, they asserted that the magistrate erred in "not finding [Appellant] facts sustained." In finding facts not sustained as to the assault and robbery, along with related charges, the magistrate explicitly relied on his factual findings to determine that McDaniel provoked T.N. by using a racial slur and that Appellant did not have any contact with McDaniel. When specific exceptions are taken to the fact finding of the magistrate, the circuit court is required to make specific findings concerning those allegations of error. *Lemley v. Lemley*, 102 Md. App. 266, 275 (1994)

(citing *Bagley v. Bagley*, 98 Md. App. 18, (1993)). "[T]he chancellor's opinion should reflect consideration of the relevant issues and the reasoning supporting the chancellor's independent decisions on those issues. . . ." *Lemley*, 102 Md. App. at 278 (quoting *Kirchner v. Caughey*, 326 Md. 567, 572 (1992)). The circuit court's opinion fails in this regard.

And to be clear, we are not ignorant of the extensive jurisprudence that "[d]eference to the fact-finding does not imply necessary deference to the recommendation." *Wenger*, 42 Md. App. at 606. "Upon his findings of fact, the [magistrate] recommends an ultimate disposition. Upon *those same findings of fact*, the [circuit court] must make his own independent disposition." *Id*. (emphasis added). Certainly, "[i]f the chancellor had no choice but to affirm the recommendation of the master (or his finding of the ultimate, conclusory fact which is indistinguishable from the recommendation) unless it was clearly erroneous, this would be the forbidden delegation of the judicial function." *Id*. at 603. (quotations omitted). Nonetheless, our case precedent is saturated with law regarding the deference to be paid to the magistrate's findings of facts,

> based upon the sound principle that the master saw and heard the witnesses and was able to make the subtle judgments based upon appearance, upon tone of voice, upon even non-verbal communication, etc. that are never available upon the pages of a transcript as perused after the fact either by a chancellor in his chambers or an appellate court upon later review.

Wenger, 42 Md. App. at 604. As such, when the magistrate's fact finding is contested, the circuit court's responsibility is to outline in the record how each challenge was resolved. *See Domingues*, 323 Md. at 496. Then, "utilizing accepted principles of law, the chancellor must then exercise independent judgment to determine the proper result." *Id*.

We also draw a stark distinction between this case and the majority of other cases, where the magistrate's finding of fact could indeed lead the circuit court, as the ultimate trier of fact, to a number of dispositions, which may or may not correspond to the magistrate's recommendation.[4] Yet here, if the circuit court had deferred to the magistrate's credibility determiniation with respect to T.N.'s testimony that Appellant did not touch McDaniel and had no part in T.N.'s assault on McDaniel, absent a finding that this determination was clearly erroneous or not supported by the record, then the only definitive disposition the circuit court could have found was that Appellant did not assault McDaniel. In this case, the modality of assault alleged is the "use of force or threat of force." *See* Crim. Law. § 3-203. Regardless, again, if the circuit court had relented to the magistrate's fact finding that "[T.N.] struck [McDaniel] spontaneously when [McDaniel] called him a 'black bitch[,]'" that "there is no evidence that [Appellant] expected this[,]" and that "[Appellant] did not act in concert with [T.N][,]" there exists no other grounds for the circuit court to find, beyond a reasonable doubt, that Appellant used force or the threat of force to rob McDaniel.

Accordingly, since there was only one outcome to be drawn from the magistrate's fact finding, the circuit court did abuse its discretion in failing to defer to the Magistrate's credibility determination concerning T.N's testimony about the assault. We have held that

[4] *See e.g., Bar Ass'n of Baltimore City v. Marshall*, 269 Md. 510, 516 (1973) (The Court of Appeals adopted the Hearing Panel's fact finding regarding the credibility of the Appellant, but for the ultimate disposition, decided to impose a different and more extreme disposition, based on their independent review of the facts.").

"although the report is only advisory, the court should give full consideration to it, particularly with respect to the credibility of witnesses, where the testimony is conflicting." *Wenger*, 42 Md. App. at 605. Absent a finding of clear error or lack of support for this fact finding in the record, we do not see any Court finding contrary to what the magistrate found, who actually observed the witnesses and resolved the conflict between T.N.'s testimony and McDaniel's testimony, through his credibility determinations.

Theft Count

The magistrate was unable to resolve the discrepancy between T.N's testimony and McDaniel's testimony on the issue of whether Appellant and K.R. had contact with the truck being used by McDaniel. Based upon transcript of McDaniel's testimony and the video clips, the circuit court held that Appellant did get on the truck bed with the intent to steal from McDaniel. Given that circuit court's recommendation is an acute difference from the magistrate's, "[o]ur review must [] focus on whether the [circuit court] had before it sufficient first level-facts supported by credible evidence upon which [it] could make [its] recommendations." *Levitt*, 79 Md. App. at 403. We conclude that the circuit court did have enough first-level facts from the transcript record and surveillance video to resolve that Appellant attempted to steal from McDaniel.

Based on the surveillance video, the magistrate conceded that there was a "reasonable inference" that the respondents were up to no good when they entered the garage. With respect to the surveillance clip of two of the respondents running from the garage, followed by the third respondent, and then McDaniel, the magistrate elaborated

that "the respondents may have been running because they had just committed an offense or they may have been running because their companion committed an offense and they didn't want to get in trouble." Furthermore, the magistrate observed that the tape simply established that the respondents were in the garage, but the actions of the respondents at the time of T.N.'s assault were not recorded on the tapes. Conversely, the circuit court evaluated the respondent's "furtive, stealth-like movements" and "collaborative and coordinated movement" in the garage as evidence that Appellant got on the truck bed with the intent to steal. The circuit court explained that even though T.N. testified that he dropped money down the side of the garage, none of the video clips show any of the respondents searching for any items as they leaped over or walked toward the ramp's wall. The circuit court also outlined that "if the recovery of the dropped dollar bill was true, there would have been no reason for the respondents to go deeper into the garage away from the wall and the exit, to engage McDaniel." In this regard, the circuit court believed McDaniel.

Because the magistrate could not settle the inconsistency between T.N. and McDaniel's testimony, and the circuit court conducted it's own independent evaluation regarding the Appellant's contact with the truck, reviewing the surveillance video and the testimony presented (and believing McDaniel's testimony as to these facts), we do not find an abuse of discretion with respect to the theft count.

Robbery Counts

Robbery is a specific intent crime, and the "hallmark of robbery, which distinguishes it from theft, is the presence of force or threat of force...." *Fetrow v. State*,

156 Md. App. 675, 687 (2004) (citing *Coles v. State*, 374 Md. 114, 123 (2003)); *See also* Crim. Law. § 3-402. Consequently, without assault, of any modality, a robbery did not occur, and the only charge left is theft. Since we have *per se* adopted the magistrate's determination that an assault did not occur in this case, we also find that the charges for attempted robbery and conspiracy to rob cannot not stand, lest we have legally inconsistent[5] dispositions, which are impermissible. *See State v. Stewart,* 464 Md. 296, 309 (2019) (per curiam) (citing *Givens v. State*, 449 Md. 433, 437 (2016)) ("legal inconsistency in verdicts is not permissible . . . .").

CONCLUSION

Since the circuit court failed to defer to the magistrate's first-level fact finding regarding the assault count, absent an indication of clear error or lack of evidence, we reverse the judgment of assault in the second degree and adopt the magistrate's finding as to this count.

[5] Quoting Judge Glenn T. Harrell, Jr., *Stewart v. State* reiterated multiple definitions of a "legal inconsistent verdict:"

> [A] legally inconsistent verdict occurs where a jury acts contrary to a trial [court]'s proper instructions regarding the law.... A legal inconsistency ... occurs when an acquittal on one charge is conclusive as to an element [of] a charge on which a conviction has occurred.... [I]f the essential elements of the counts of which the defendant is acquitted are identical and necessary to prove the count of which the defendant is convicted, then the verdicts are inconsistent. Verdicts of guilty of crime A but not guilty of crime B, where both crimes arise out of the same set of facts, are legally inconsistent when they necessarily involve the conclusion that the same [ ] element or elements of each crime were found both to exist and not to exist.

State v. Stewart, 464 Md. at 316 (quoting *Price v. State*, 405 Md. 10, 35 (2008) (Harrell, J. concurring)).

We find that the circuit court did have sufficient facts to determine that Appellant did attempt to steal from McDaniel, and we affirm the count of being in or on a motor vehicle with intent to commit theft. Additionally, without the assault count, the robbery and conspiracy to rob counts do not stand, and *in absentia*, are dismissed.

JUDGMENT OF THE CIRCUIT COURT OF BALTIMORE CITY REVERSED IN PART AND AFFIRMED IN PART. CASE REMANDED TO THE CIRCUIT COURT WITH DIRECTION TO ADOPT THE MAGISTRATE'S RECOMMENDATION WITH RESPECT TO THE ASSAULT COUNT AND FOR FURTHER DISPOSITION. COSTS TO BE PAID ½ BY APPELLANT AND ½ BY THE MAYOR AND CITY COUNCIL OF BALTIMORE CITY.