Circuit Court for Prince George's County
Case No. JA-15-0861

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0013

September Term, 2016

IN RE: C.H.

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

JJ.

Opinion by Arthur, J.

Filed: December 14, 2016

The State filed a petition in the Circuit Court for Prince George's County, sitting as a juvenile court, to have appellant C.H. adjudicated as a delinquent. The petition alleged that C.H. committed acts that, if committed by an adult, would constitute robbery with a dangerous weapon, robbery, second-degree assault, possession of a regulated firearm by a person under the age of 21, and the use of a handgun in the commission of a felony or crime of violence.

At the conclusion of an adjudicatory hearing, the court found C.H. to be involved in the alleged conduct and placed him on Level C supervision and GPS monitoring. He appealed. For the reasons explained below, we affirm.

QUESTIONS PRESENTED

C.H. presents three questions for review:

1. Did the juvenile court err in relying on a document that had not been offered or admitted into evidence in finding the appellant involved in the crimes charged?

2. Was the evidence legally sufficient to sustain the juvenile court's finding that the appellant was involved in the criminal charges?

3. Did the juvenile court err in allowing a witness to invoke a general Fifth Amendment privilege instead of proceeding on a question by question basis?

FACTUAL AND PROCEDURAL BACKGROUND

The State's primary witness was Nicholas H., the victim of the alleged robbery. Nicholas testified that he agreed to sell an iPhone 5 for $140 to Nyle S. and that the two met to complete the sale. Nyle told Nicholas that he needed to go to a nearby store to get change. As Nicholas, Nyle, and their classmate Marquette walked to the store, they were approached by C.H., whom Nicholas knew from school.

C.H. pulled up his shirt, and Nicholas testified that he saw the butt of a black handgun in C.H.'s pants. C.H. told the young men to give him all of their belongings. Nyle, Nicholas, and Marquette handed their phones to C.H., but C.H. said he did not want Nicholas's personal phone. He patted Nicholas down as a police officer would, found the phone Nicholas had planned to sell Nyle, and took that phone from Nicholas's back pocket. C.H. also took Nicholas's wallet, which contained $100.

Nicholas, Marquette, and Nyle immediately ran to Nicholas's house. Nicholas told his parents about the incident, and his mother called the police. Nicholas said that when he told his parents what had happened, Nyle and Marquette "ran off."

Nicholas testified that he had not spoken with Nyle since the day of the robbery. Both before and after the robbery, however, Nicholas had participated in an online group chat that included Nyle. Approximately one hour after the robbery, Nicholas noticed that Nyle was sending text messages from a number that was associated with the phone that C.H. had purportedly stolen earlier in the day. Abruptly and without provocation, Nyle brought up the subject of the robbery in the group chat and volunteered that C.H. was not the robber.

A few days after the robbery, the police searched C.H.'s grandmother's house and collected his iPhone 4s, his pants, and a notebook. The police did not recover the weapon that Nicholas claimed to have seen. C.H. denied that he had robbed Nicholas.

During the adjudicatory hearing, C.H. called Nyle. Nyle testified that he knew Nicholas and C.H. from school. He went on to testify that on the day of the robbery he had sent Nicholas a text message to arrange the purchase of a cell phone. At that point,

the court interjected to inquire about whether anyone had advised Nyle of his Fifth Amendment privilege against self-incrimination. The court questioned how C.H. had known that Nicholas had a second phone. In addition, the court cited Nicholas's testimony that within an hour of the robbery Nyle was sending messages from a phone that had purportedly been stolen from him. The court expressed concern that after hearing his testimony the State might prosecute Nyle for conspiracy.

The court took a recess to allow Nyle to consult with an attorney. After the consultation, the attorney told the court that, based on his conversation with Nyle, the young man "might very well incriminate himself if he does testify" and that Nyle would probably exercise his privilege against self-incrimination. Nyle then returned to the stand and, in response to the court's questions, informed the court that he wished to assert his Fifth Amendment privilege against self-incrimination. The court denied C.H.'s counsel's request for an opportunity to proceed on a question-by-question basis.

At the end of the proceedings, the court found C.H. involved on all of the charges. It ordered that C.H. be placed on Level C supervision and GPS monitoring. This timely appeal followed.

DISCUSSION

I. Reference to the Petition

Although Nicholas testified that he saw the butt of a black handgun in C.H.'s pants, he admitted on cross-examination that he had given a written statement saying only

that he saw something in the shape of a gun and did not describe its color.[1] During closing argument C.H.'s counsel suggested that Nicholas had fabricated his testimony that he had seen the butt of a gun. The following exchange ensued:

> [COURT]: You're not saying that's something he came up with today, are you?
>
> [DEFENSE COUNSEL]: I am saying that he just came up with that today.
>
> [COURT]: Okay. Anything else?
>
> [DEFENSE COUNSEL]: Because in his statement he didn't say that.

Although Nicholas's written statement said that he had seen only the shape of a gun, the trial judge knew, from his review of the court file, that the delinquency petition asserted that Nicholas had actually seen the butt of a gun.[2] In a colloquy with C.H.'s counsel during Nicholas's cross-examination, the court observed that Nicholas may have made statements to the police other than his written statement.

When the court announced its decision, the following exchange occurred:

> [COURT]: …This case comes down to the credibility of the witness. I asked counsel regarding whether this was something Mr. Nicholas H. came up with today regarding the showing of the butt of the gun because that's what's listed in the petition.

[1] The written statement was an exhibit at the adjudicatory hearing, but it does not appear to be a part of the record on appeal. Our descriptions of the written statement are based on questions posed by C.H.'s counsel.

[2] The petition alleges that C.H. "lifted his shirt, revealing the butt of a handgun." Similarly, the application for statement of charges quotes "the victim" as stating that "the suspect" "lifted his shirt and displayed the butt of an unknown type [of] handgun."

[DEFENSE COUNSEL]: Your Honor, I would ask that you not consider the petition. The petition is not in evidence.

[COURT]: It's not in evidence, but you're the one that said that was something that he came up with today.

[DEFENSE COUNSEL]: The petition is not in evidence.

[COURT]: It's in the Court file. That is something that was not, you say –

[DEFENSE COUNSEL]: I can't –

[COURT]: Wait, counsel. You're the one that said and I asked you, you told the Court that was something that he came up with today.

[DEFENSE COUNSEL]: I said that it was inconsistent with –

[COURT]: No, you did not. I asked you point blank was it something that he came up with today and you said yes. Now you're going to stand there and tell me you didn't say that?

[DEFENSE COUNSEL]: No, I'm not going to say that, Your Honor.

The court proceeded to summarize Nicholas's testimony. Based on the testimony it heard that day, the court said that it could find no reason to question the credibility of Nicholas's recitation of the events.

On appeal, C.H. complains that the court erred in "relying" on a document that was not in evidence – specifically, the juvenile petition. We agree that the court erred in referring to a document that was not in evidence. In the circumstances of this case, however, we are convinced that the error was harmless beyond a reasonable doubt. *Dionas v. State*, 436 Md. 97, 108 (2013); *Dorsey v. State*, 276 Md. 638, 659 (1976)).

As the finder of fact in this juvenile proceeding, the trial judge had the obligation to assess the credibility of the witnesses who appeared before him. The judge saw and

heard Nicholas's testimony, as well as C.H.'s assault on Nicholas's credibility. The judge also saw and heard from C.H., who denied committing the robbery. In addition, the judge heard about the unusual chain of events in which Nyle, who had arranged for Nicholas to be at the specific place where the theft occurred, inexplicably began sending text messages from the stolen phone shortly after the theft. The judge also heard that shortly after the robbery, before anyone had even accused C.H. of wrongdoing, Nyle was spontaneously vouching for C.H.'s innocence.

On the basis of the admissible evidence that he heard, the judge found Nicholas to be credible. He referred specifically to Nicholas's testimony that he knew C.H. from school. The judge also referred to the complete absence of any motivation on Nicholas's part to make a false accusation against C.H. Finally, the judge referred to Nicholas's consistent account, since the day of the robbery itself, that C.H. had committed the robbery.

"In a bench trial the issue is whether or not the trial judge relied on improper evidence" (*Nixon v. State*, 140 Md. App. 170, 189 (2001)), but the judge did not rely on the juvenile petition in making his credibility determination here. The judge did not conclude that C.H. had a gun because the petition alleged that he had a gun. Rather, he concluded that C.H. had a gun (and used it to commit the robbery) because he believed Nicholas's testimony and disbelieved C.H.'s. In these circumstances, the erroneous reference to the juvenile petition was harmless beyond a reasonable doubt. *See, e.g.*, *Nixon*, 140 Md. App. at 189-91 (finding that admission of improper evidence was reversible error only on counts on which trial court apparently did rely on it and harmless

error on counts on which the improper evidence was absent from the statement in which the court articulated what it relied on).

II. Sufficiency of the Evidence

C.H. contends that the evidence presented at the hearing was legally insufficient to sustain the court's findings concerning the use of a dangerous weapon, a regulated firearm, or a handgun. He stresses that the State did not recover the gun that Nicholas claimed to have seen and that the State did not disprove the possibility that "the robber" had only a toy gun, a starter gun, or a CO_2 pistol (as opposed to a firearm or a deadly weapon). He appears not to challenge the sufficiency of the evidence for robbery or second-degree assault.

When faced with a challenge to the sufficiency of the evidence in a juvenile proceeding, Maryland courts have applied the test set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *See*, *e.g.*, *In re Timothy F.*, 343 Md. 371, 380 (1996); *In re James R.*, 220 Md. App. 132, 137 (2014). Under that test, "the appropriate inquiry is not whether the reviewing court believes that the evidence established guilt beyond a reasonable doubt" (*Timothy F.*, 343 Md. at 380), but "'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.'" *Id.* (quoting *Jackson v. Virginia*, 443 U.S. at 318).

"[T]angible evidence in the form of the weapon is not necessary to sustain a conviction" for a handgun offense. *Brown v. State*, 182 Md. App. 138, 166 (2008). Instead, "the weapon's identity as a handgun can be established by testimony or by

inference." *Id.* (collecting authorities). "For instance, the inference that a weapon is 'capable of being concealed on the person,' [Md. Code (2002, 2007 Supp.), § 4-201(c)(1) of the Criminal Law Article], has been held permissible where . . . a witness testified that the defendant had in fact concealed the weapon on his person prior to pointing it at the witness." *Id.* at 167 (citing *Johnson v. State*, 44 Md. App. 515, 516-19 (1980)). "[I]n the absence of contradictory evidence, the prosecution is not required to introduce specific evidence that the weapon was a firearm; was operable; or was not a toy." *Id.* at 167 (footnote and citations omitted).

C.H. concedes that the State produced eyewitness testimony – Nicholas's testimony – that when C.H. pulled up his shirt, he saw the butt of a gun in C.H.'s pants and that the gun was black. C.H. argues, however, that the evidence was "legally insufficient" to sustain a finding that he was involved in a robbery with a dangerous weapon, possession of a firearm, or use of a handgun in the commission of a crime of violence. He asserts that a weapon was never recovered and never fired in Nicholas's presence, and that the State did not present any evidence to support Nicholas's testimony. He points to Nicholas's pretrial statement, in which he said that he saw the shape of a gun, but did not mention the butt of a gun. He mentions Nicholas's general description of the weapon in his testimony, but complains of the lack of corroborating evidence. He maintains that the testimony did not prove that he actually possessed a weapon.

In its emphasis on Nicholas's pretrial statement that he saw only the shape of a gun, C.H.'s argument is an invitation to reweigh the evidence, which we cannot and will not do. At the hearing, Nicholas testified that when C.H. lifted his shirt, he saw the butt

of the black gun that C.H. had been concealing. The juvenile court had an opportunity to evaluate Nicholas's eyewitness testimony and C.H.'s attack on it. The juvenile court chose to credit Nicholas's testimony and to discount or disregard the rest.

The dispositive issue is not whether Nicholas's testimony was credible, but whether his testimony was sufficiently detailed to support the juvenile court's conclusions that he had used a dangerous weapon, a regulated firearm, or a handgun. Because the State can prove a person's guilt of a handgun offense even if it does not recover the weapon that the person allegedly used, it follows that proof of guilt "may rest upon extrinsic evidence as to the nature of the weapon," *Couplin v. State*, 37 Md. App. 567, 578 (1977), *cert. denied*, 281 Md. 735 (1978), *overruled in part on other grounds by State v. Ferrell*, 313 Md. 291, 299 (1988), such as the victim's testimony.

In *Couplin* a robbery victim testified that the defendant used a "double-barreled" "handgun" and a "small pistol." *Id.* at 575-76. This Court held that her perfunctory description was sufficient to uphold a conviction for the use of a handgun during the commission of a crime of violence. *Id.* at 578. By the same token, Nicholas's testimony, that he saw the butt of black handgun protruding from C.H.'s waistband, was not so perfunctory, vague, or imprecise as to preclude the juvenile court finding C.H. to be involved in the handgun charges alleged in the petition. In the absence of evidence to contradict Nicholas's testimony, the State was "not required to introduce specific evidence that the weapon was a firearm; was operable; or was not a toy." *Brown*, 182 Md. App. at 167. The court could rely upon Nicholas's testimony, along with other

evidence and the circumstances of the event, to conclude beyond a reasonable doubt that the item in C.H.'s waist was in fact a handgun.

III. Invocation of the Fifth Amendment Privilege

C.H. argues that the court erred when it permitted Nyle S. to assert a general privilege against self-incrimination. C.H. contends that the court should have permitted him to proceed on a question-by-question basis.

In support of his contention, C.H. relies on *Richardson v. State*, 285 Md. 261 (1979), a case concerning the procedure for determining whether a witness may invoke the privilege against self-incrimination in a criminal trial of an adult, typically before a jury, in circuit court. In those circumstances:

> The witness should first be called to the stand and sworn. Interrogation of the witness should then proceed to the point where he asserts his privilege against self-incrimination as a ground for not answering a question. If it is a jury case, the jury should then be dismissed and the trial judge should attempt to "determine whether the claim or privilege is in good faith or lacks any reasonable basis." If further interrogation is pursued, then the witness should either answer the questions asked or assert his privilege, making this decision on a question by question basis.

Id. at 265 (quoting *Midgett v. State*, 223 Md. 282, 289 (1960), *cert. denied*, 365 U.S. 853 (1961)) (citations omitted).

Richardson applies when a witness invokes the privilege against self-incrimination on his or her own initiative. *See*, *e.g.*, *Richardson*, 285 Md. at 265. The procedure in *Richardson* is designed to facilitate a trial court's inquiry into whether the "silence is justified" because "the witness has reasonable cause to apprehend danger from a direct answer" (*see Hoffman v. United States*, 341 U.S. 479, 486 (1951)) or whether the witness

has no basis for the invocation of the privilege and should be required to answer. On its face, *Richardson* does not apply when a court, on its own initiative, advises an unrepresented person, who may not even be aware of the privilege, that his or her testimony may result in self-incrimination, as the juvenile court "quite properly" did in this case. *See Midgett*, 223 Md. at 291.

Here, after recognizing that Nyle's testimony might lead him to incriminate himself, the court appointed an attorney, who consulted with Nyle and informed the court that his client "might very well incriminate himself if he does testify." The court proceeded to re-call the young man, who stated that he wished to assert his Fifth Amendment privilege. Although C.H. complains that the court should then have permitted him to proceed on a question-by-question basis, it is difficult to envision how Nyle could have answered any questions without potentially incriminating himself. In particular, Nyle could not have testified about the robbery without opening himself up to questions about how C.H. knew that Nicholas had a second phone, whether he (Nyle) had told C.H. about the second phone, how he managed participate in a group chat with his old phone shortly after C.H. had purportedly stolen it from him, why he volunteered that C.H. had not robbed the three young men, and about whether the robbery was an inside job in which Nyle himself was a co-conspirator. Nor has C.H. suggested any questions, substantive or otherwise, that he could have asked without triggering Nyle's Fifth Amendment privilege.

In summary, the court had no obligation to follow the procedures in *Richardson* in this juvenile case, in which an unrepresented juvenile invoked the privilege against self-incrimination only after the court itself perceived that the privilege might apply.

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