Circuit Court for Prince George's County
Case No. JA-20-0119

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 2108

September Term, 2021

IN RE B.F.

Friedman,
Tang,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: December 16, 2022

The Circuit Court for Prince George's County, sitting as a juvenile court, found appellant, B.F., involved in robbery, second-degree assault, and theft. Following a disposition hearing, which resulted in his commitment to a staff-secure facility, he noted this appeal, raising two issues:

> I. Did the juvenile court err in ruling that appellant's motion to suppress any in-court identification tainted by an unduly suggestive out-of-court identification was moot?
>
> II. Was the evidence sufficient to sustain appellant's findings of involvement for robbery, second-degree assault, and theft?

Because we find no error, and because the evidence was sufficient, we affirm.

BACKGROUND

The Attack

On February 5, 2020, fourteen-year-old J.H., an eighth grader at Gwynn Park Middle School in Brandywine, in Prince George's County, was taking a bus home from school. When he exited the bus, he was accosted by "three males" who asked whether he "had any Air Pods[.]" J.H. replied that he did not and "kept walking[.]" As he did so, one of the males tripped him, and "the other two pushed [him] down on the ground."

After J.H. fell to the ground, the three assailants "punch[ed]" him and "kick[ed]" him in the face as they "went through" his pockets. Although J.H. did not know his attackers and had never seen them before, he was "able to see" them during the attack, and he specifically identified appellant as one of his attackers. According to J.H., appellant and the others took his Air Max shoes, valued at approximately $150; his book bag; and

his Calvin Klein coat, valued at approximately $400. After "the last one kicked" J.H. in the head, and the assailants "ran off[,]" J.H. "walked home barefoot."

When J.H. arrived at his home, he notified his family that he had been attacked, and both his aunt and his mother called 911.[1] Police officers responded to his residence and interviewed him. J.H. described the attackers as black males, aged 16 to 18, under six feet tall, "slim," and "wearing all black." One of them had "brown skin[,]" and the other two had "dark skin."

Police officers canvassing the area spotted three suspects, who matched J.H.'s descriptions of them, as they were crossing Crain Highway toward a shopping center.[2] The suspects fled, but police officers apprehended two of them, appellant and another person, J.M. The victim's shoes were recovered from a bush near where J.M. was apprehended, and the victim's keys were found on appellant's person.

Legal Proceedings

On April 6, 2020, just a few weeks after the COVID lockdowns began, a delinquency petition was filed, in the Circuit Court for Prince George's County (sitting as a juvenile court), alleging that appellant committed acts that, had they been committed by

[1] A compact disc containing recordings of several contemporaneous 911 calls related to the attack was admitted into evidence during redirect examination of J.H. at the adjudicatory hearing. Although not contained in the excerpt that was played in open court, one of those 911 calls was placed by a woman who identified herself as J.H.'s aunt, and another was placed by his mother.

[2] Some background facts were taken from the delinquency petition because much of the background was not elicited at the adjudicatory hearing. The parties do not contest these facts.

an adult, would be robbery, assault in the second degree, and theft of property having a value less than $1,000. A series of postponements ensued.[3] The adjudicatory hearing ultimately was scheduled to take place on October 5, 2021.

The day before the rescheduled adjudicatory hearing, counsel for appellant filed a "Motion to Suppress Pretrial Identification." That motion alleged that the police use of a show-up procedure to elicit J.H.'s out-of-court identification of appellant as one of the assailants "was unduly suggestive and did not possess sufficient indicia of reliability." As a remedy, appellant asked that the juvenile court suppress not only "the out-of-court eyewitness identification" by J.H., but also "any in-court identification tainted by it."

When the adjudicatory hearing was convened, appellant's counsel reminded the court of the pending motion to suppress the pretrial identification of appellant by the victim, which, she claimed, had occurred "under conditions that were highly suggestive[.]" The prosecutor countered that the motion was "quite premature" and asked the court to address the matter during the adjudicatory hearing, declaring, "I'm quite confident that the Court will find that there's more than enough evidence to show that there was no suggestive

[3] During much of the time this case was pending in the juvenile court, Maryland courts were operating under emergency protocols and were closed for extended periods of time. *See Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 351-63 (2022) (describing the effect of the COVID pandemic on Maryland courts and the administrative orders issued by the Chief Judge of the Court of Appeals in response to the pandemic).

We further note that, effective December 14, 2022, the Chief Judge of the Court of Appeals is now called the Chief Justice of the Supreme Court of Maryland, and the appellate courts of Maryland, formerly known respectively as the Court of Appeals and the Court of Special Appeals, are henceforth known as the Supreme Court of Maryland and the Appellate Court of Maryland.

identification." The court appeared to agree with the prosecutor but was interrupted by defense counsel:

> THE COURT: Yeah, this seems like a --
>
> [DEFENSE COUNSEL]: **Your Honor, I totally disagree. This motion specifically talks about the information --**
>
> THE COURT: Well, you filed it yesterday.
>
> [DEFENSE COUNSEL]: I'm sorry?
>
> THE COURT: You filed it yesterday. I mean, you say this case is pending for -- since you -- well, since February of 2020 or whatever you said. So why did you just file it yesterday? You just found out about it yesterday?

(Emphasis added.)

Appellant's counsel protested that she only recently had come into possession of video evidence relevant to her motion and that she had finished viewing it within a few days of filing the motion, apparently implying that she had acted with due diligence. The prosecutor countered that appellant's counsel was "being a bit [dis]ingenuous" and that the State had provided nearly all the relevant evidence in August 2021, more than one month before the suppression motion was filed. The juvenile court expressed doubt as to whether the show-up would even turn out to be relevant, and it ruled that it would address the issue during the adjudicatory hearing, after it had an opportunity to hear the State's evidence. The following colloquy occurred:

> So we'll address this as the case is in progress and if the issue comes up with regard to show-up then the State will get -- I mean, the defense will get an opportunity to make [its] arguments regarding why the Court should not rely on any show-up evidence. All right? Or show-up identification.

Anything else?

[DEFENSE COUNSEL]: Court's brief indulgence.

(Pause.)

[DEFENSE COUNSEL]: **No, Your Honor. We're fine to proceed.**

(Emphasis added.)

The State called two witnesses: Sergeant Alicia Wheeler, a Prince George's County Police Officer who responded to the 911 call on the date of the attack; and J.H., the victim. Sergeant Wheeler testified only briefly. She identified appellant as a person she had interviewed on the date of the attack and that he had provided "his name and date of birth, address, and . . . guardian information, contact." Given the minimal inquiry during direct examination, appellant's counsel did not cross-examine Sergeant Wheeler.

J.H.'s testimony was consistent with the factual summary set forth above. He testified, without objection, that he was "able to see who was attacking" him. Without objection, he identified appellant as one of those attackers.[4] During cross-examination, appellant's counsel challenged the reliability of J.H.'s in-court identification of appellant as one of the culprits. J.H. acknowledged, in response to questioning by appellant's counsel, that, prior to the adjudicatory hearing, he had attended Zoom conferences in the case, in which he could see B.F.'s image; that he had received court notices captioned with the title of the case, indicating that B.F. was the accused; that the descriptions of the three

[4] In addition, a cell phone video recording was admitted into evidence, over a defense objection alleging improper authentication, which depicted some of the attack. Only the victim could be clearly identified in the video recording, although it was possible to discern the clothing and general physical appearance of the assailants.

assailants he had provided to police officers "were [all] the same"; and that, while he was being assaulted, he covered his face to protect himself.

After the close of all the evidence, the prosecutor reminded the court that appellant's suppression motion was still pending, and she asked the court to make a ruling on it. The following colloquy occurred:

> THE COURT: I mean, it would be moot.
>
> [PROSECUTOR]: It was never actually --
>
> THE COURT: I don't understand.
>
> [PROSECUTOR]: -- officially ruled on. We had decided to handle the matter through the trial.
>
> THE COURT: It was reserved until we had the trial, but it's moot. You didn't -- you never called the -- you didn't rely on any --
>
> [PROSECUTOR]: So I'm just --
>
> THE COURT: -- show-up evidence.
>
> [PROSECUTOR]: I'm just asking for an official ruling on the motion --
>
> THE COURT: I mean, it's moot.
>
> [PROSECUTOR]: -- for the record.
>
> THE COURT: It wasn't raised.
>
> [PROSECUTOR]: Thank you.

Appellant's counsel did not object, and the court then heard closing arguments. During closing argument, appellant's counsel challenged the reliability of J.H.'s identification of her client as one of the assailants, asserting that the victim had given such

a "generic description" of his assailants that police officers would not have been justified in relying upon that description in attempting an investigatory stop. Appellant's counsel further asserted that the victim's in-court identification of her client had been "tainted" by repeated "expos[ure] to the name B.F. over and over again by the State advising him of the case, by the mail that comes to his house showing B.F.'s name, by Zoom in which B.F.'s name is under his Zoom hearing and by [the circuit] court conducting regular business when we call the case of B.F. and identify the name." In rebuttal, the prosecutor countered that "[a]t no point" was J.H. "unsure about who the attacker was."

At the conclusion of closing arguments, the court replayed State's Exhibit 1, a cell phone video of the attack which had been admitted into evidence through J.H.'s testimony, and after viewing it, the court declared, "The Court has observed the video again. In the video that I saw, all the individuals had on dark colored clothes, two black, one navy blue[,]" thereby impliedly finding J.H.'s description reliable. The court then announced its ruling, declaring to B.F.:

> Based on the evidence presented in this trial, the Court finds, as to Count I, finds you involved as for robbery. As to Count II, the Court finds you involved as to assault in the second degree. And on Count III, based on the evidence, the Court finds you involved of theft of less than $1,000. Court credits the evidence and the eyewitness testimony made by the victim. If it were true that all the State, if all they had was testimony from a witness saying that there were three black males, 16 to 18, under 6 feet tall, then you might have something, but that's not all that the State had.
>
> The State had eyewitness testimony from the witness who was the victim in this case. He had the opportunity to observe what was going on. He had an opportunity to observe the crime, he had an opportunity to observe you.

> There's no discrepancy between any pretrial identification and you. I mean, you're a black male, you're aged between 16 to 18, you stand under 6 feet -- I think, 6 feet tall. There's no discrepancy. He's not saying -- he wasn't identifying someone 7 feet tall. You fit that description. There's no pretrial identification of any other person that fit the description that I saw in the video that I was directed to review again.
>
> There's no evidence of taint. If I were to accept that argument, one could argue that a Respondent in your position could generate taint by asking for a continuance in court of a merits hearing and then when the victim is there said, "Well" -- on the new trial date that's scheduled say, "Well, that identification because he saw me pretrial."
>
> I don't know exactly, there's no evidence that there was any objection made from the Respondent. I don't even recall the date that the Respondent was there. May have seen you on a videotape. I don't recall that. Certainly was no objection made at the time, so I don't find the taint argument to be compelling.
>
> So I find that you are involved on all three counts. Actually, having watching the video closer just now, what can I say about three young men who ganged up on another man, young man, and traumatized him and tortures him and engages and conflicts that sort of harm to that kid?

After several continuances, the juvenile court ordered that B.F. be committed to a staff-secured placement. This timely appeal followed.

DISCUSSION

Standard of Review

Because a delinquency proceeding is conducted by the juvenile court without a jury, our review is governed by Maryland Rule 8-131(c), which provides:

> (c) **Action tried without a jury.** – When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

I.

The Parties' Contentions

Appellant contends that the juvenile court erred in ruling that his motion to suppress the victim's identification of him as one of the assailants was moot. He claims that the court did not afford him "a fair hearing on his motion during the trial" and that the court's mootness ruling effectively relieved the State of its burden to demonstrate that the victim's in-court identification was not tainted by an unduly suggestive show-up identification conducted shortly after the attack. He complains that

> [a]n issue cannot be moot just because the State fails to call any witnesses or introduce any evidence at the suppression hearing related to the issue: otherwise, the State would never [elicit] the requisite testimony when a defendant raises a constitutional violation.

Therefore, according to appellant, he is entitled to a new adjudicatory hearing.

The State, relying upon Maryland Rules 4-323 and 8-131(a), counters that this claim was not preserved because initially, appellant did not object to the juvenile court's ruling that it would defer its decision on the motion to suppress until after the State had presented its case-in-chief; during the ensuing hearing, he failed to object when J.H. identified him as one of the assailants; near the conclusion of the hearing, it was the prosecutor, not appellant's counsel, that raised the issue of the open suppression motion after the close of all the evidence; and even after the court ruled that appellant's motion was moot, his counsel failed to object at that time. On the merits of the claim, the State contends that appellant failed to satisfy his initial burden to present evidence that the show-up procedure

was unduly suggestive and tainted the victim's in-court identification, and therefore, the juvenile court did not err in ruling that the motion to suppress was moot.

Analysis

"Title 4 *only* applies to 'criminal matters, post conviction procedures, and expungement of records in the District Court and the circuit courts.'" *In re Victor B.*, 336 Md. 85, 95 (1994) (quoting Md. Rule 4-101). Therefore, "the criminal rules of procedure . . . do not apply to juvenile proceedings." *Id.* Thus, the State's reliance upon Rule 4-323 is misplaced, and we cannot apply that rule in determining whether this claim was preserved.

Maryland Rule 8-131(a), however, does apply to this case. It provides, in relevant part, that "[o]rdinarily, the appellate court will not decide any other issue [except jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court[.]"

At the conclusion of the evidentiary phase of the adjudicatory hearing, the *prosecutor* alerted the court that appellant's eleventh-hour motion to suppress the victim's identification was still pending,[5] and the court replied, "I mean, it's moot." Appellant's

[5] At the time of the adjudicatory hearing, such a motion could be filed right up until the adjudicatory hearing was held because the then-extant version of the Juvenile Causes Rules was silent on the matter. Shortly after the adjudicatory hearing in this case, new Juvenile Causes Rules were adopted by the Supreme Court, which became effective January 1, 2022. *Rules Order*, Nov. 9, 2021 (adopting new Title 11 of the Maryland Rules, as proposed in the 208th Report of the Rules Committee and as amended by the Supreme Court, effective Jan. 1, 2022). Under current Maryland Rule 11-419(c)(1), a motion to suppress an identification "shall be filed no later than five business days before the first scheduled adjudicatory hearing, unless the court, for good cause shown, orders otherwise."

counsel stood mute; not only did she not challenge that ruling, she furthermore did not request an opportunity to introduce evidence that the out-of-court identification procedure was unduly suggestive and that it tainted the victim's in-court identification of her client as one of the perpetrators. Nonetheless, "it plainly appears by the record" that the juvenile court "decided" that the suppression motion was moot. That is all that Rule 8-131(a) requires. The claim was preserved for our review.[6]

Appellant's victory on the preservation issue is a pyrrhic one, however. His claim fails because no evidence was elicited during the evidentiary phase of the adjudicatory hearing concerning the alleged use of unduly suggestive identification techniques at the time of the show-up identification. Appellant's complaint that the juvenile court effectively relieved the State of its burden to show that J.H.'s in-court identification of B.F. was not tainted by an unduly suggestive show-up identification misapprehends the allocation of the burden of production.

In addressing a due process challenge to the admissibility of an identification, "we apply a two-step inquiry[.]" *Morales v. State*, 219 Md. App. 1, 13 (2014). "First, the burden falls on the accused to establish that the procedures employed by the police were impermissibly suggestive." *Id.* "If the accused demonstrates that the identification was

[6] Because this claim was preserved under Rule 8-131(a), it is irrelevant whether, as the parties seem to assume, appellant's counsel objected, at the outset of the adjudicatory hearing, to the court's decision to defer ruling on the eleventh-hour motion to suppress. We further note that, under new Rule 11-419(a)(3), which became effective after the adjudicatory hearing was held in this case, a timely motion to suppress an identification "shall be determined on the day of trial but prior to trial[.]" Thus, it is unlikely that a claim such as the one before us will appear in a future case in the present procedural posture.

tainted by suggestiveness, the burden shifts to the State to prove by clear and convincing evidence that the reliability of the identification outweighs 'the corrupting effect of the suggestive procedure.'" *Id.* at 13-14 (quoting *Thomas v. State*, 139 Md. App. 188, 208 (2001)). *Accord Smiley v. State*, 442 Md. 168, 180 (2015). Here, appellant failed to elicit any evidence that the show-up identification employed on the day of the attack was impermissibly suggestive. Therefore, the juvenile court correctly concluded that appellant's motion to suppress the identification was moot.

Appellant's contention that he was effectively prevented from eliciting evidence regarding the suggestiveness of the show-up identification because the State sidestepped the issue during its case-in-chief is without merit. Nothing prevented appellant from calling either Sergeant Wheeler or J.H. as defense witnesses to afford an opportunity to explore the issue. He did not. As the State aptly put it in its brief, "defense counsel could not have conveyed less of an interest in further litigating the motion to suppress." The failure of appellant's counsel to litigate the issue is not attributable to the State.

II.

The Parties' Contentions

Appellant contends that the evidence was insufficient to sustain the court's finding that he was involved in the offenses, even though the victim identified him in court as one of the assailants, and the juvenile court expressly credited his testimony. Appellant asserts that "[c]ourts have long recognized the malleability of eyewitness identifications of strangers, noting that the stress from the circumstances of the crime plus the identification procedure itself" potentially may lead to misidentification. Appellant then plunges

headlong into an attack on the reliability of the victim's in-court identification of him as one of his assailants:

> The concern of the malleability of eyewitness identifications is central to this case. The sole issue in this case was the identity of the individuals who robbed J.H. Even viewing the evidence in the light most favorable to the State, a rational trier of fact could not conclude that the evidence demonstrated beyond a reasonable doubt that B.F. was one of those individuals. J.H. first encountered the robbers when he was walking on the sidewalk, approximately ten feet away from him. When the males tried to get J.H.'s attention to ask if he had any Air Pods, he said no and kept walking, thereby not paying further attention to the group. The group followed J.H. from behind and pushed him to the ground, which means that he did not have a view of them as they pushed him to the ground. J.H. was on the ground as the group kicked and punched him and took his items. While he was on the ground, J.H. put up his arms to protect his face, and turned his head to try to avoid the punches. J.H. testified unequivocally that he did not know the males, he had never seen them before, and he was not friends with them. J.H. also testified that he felt "scared" and "feared for my life."
>
> Additionally, the video of the robbery shows J.H. face-down on the ground, further inhibiting his ability to see and later identify his assailants. And though J.H. consistently described all of the attackers as wearing all black, the video shows that at least one of the assailants was wearing light-blue denim jeans.
>
> The circumstances of this robbery contain many of the variables that courts have recognized corrupt eyewitness memory. J.H. had no prior familiarity with anyone from the group, lessening the likelihood that he would later be able to correctly identify them because he was identifying a stranger. He had limited and fleeting opportunity to view the robbers, particularly because they pushed him from behind, and while he was on the ground he was protecting his face. It was also an incredibly stressful event for J.H., meaning that the memory of his robbers likely imprinted in his memory in a less clear manner. That J.H. testified that he recognized B.F. "[b]ecause he's the attacker," is not the dispositive fact in this case. A reasonable fact-finder could not find beyond a reasonable doubt, with the stressful and fleeting circumstances of the robbery, that B.F. was involved.

(Internal record citations omitted.)

The State counters that because the victim made an in-court identification of appellant as one of the assailants, and the juvenile court expressly credited his testimony, the evidence was legally sufficient to sustain the findings of involvement. In support, the State cites *Reeves v. State*, 192 Md. App. 277, 306 (2010), where we stated the "well-established rule in Maryland that the testimony of a single eyewitness, if believed, is sufficient evidence to support a conviction."

Test for Sufficiency

"In determining whether the evidence was sufficient to show that a juvenile has committed a delinquent act, we utilize the same standard of review that applies in criminal cases: 'whether the evidence, adduced either directly or by rational inference, enabled the trier of fact to be convinced beyond a reasonable doubt that the [juvenile] committed the act.'"[7] *In re J.H.*, 245 Md. App. 605, 622 (2020) (quoting *In re George V.*, 87 Md. App. 188, 193 (1991)). *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (expressing the standard as "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 applying that standard, we consider both direct and circumstantial evidence, and we do not assess the credibility of the witnesses or otherwise

[7] As the Supreme Court has observed, a "child may not be adjudicated delinquent unless the State proves each element of the offense beyond a reasonable doubt." *Lopez-Sanchez v. State*, 388 Md. 214, 225 (2005), *superseded by statute on other grounds as stated in Hoile v. State*, 404 Md. 591, 605 (2008) (citing 2006 Md. Laws, ch. 260). *See In re Winship*, 397 U.S. 358, 364-65 (1970) (holding that due process requires application of beyond-reasonable-doubt standard in adjudicatory hearings).

weigh the evidence adduced, as those fall within the exclusive prerogative of the fact finder. *State v. Manion*, 442 Md. 419, 431-32 (2015); *State v. Smith*, 374 Md. 527, 534 (2003).

Analysis

We find no merit in appellant's sufficiency claim. His attack against the reliability of the victim's in-court identification of him goes to the weight of that evidence, not its sufficiency. It has long been the law in Maryland that a victim's in-court identification of his assailant, if believed by the fact finder, is sufficient evidence of criminal agency. For example, in *Branch v. State*, 305 Md. 177 (1986), the Supreme Court declared: "Identification by the victim is ample evidence to sustain a conviction." *Id.* at 183 (quoting *Walters v. State*, 242 Md. 235, 237-38 (1966)). Indeed, even an "extrajudicial identification is sufficient evidence of criminal agency to sustain a conviction," despite the declarant's inability "to identify the accused at trial." *Nance v. State*, 331 Md. 549, 561 (1993). *Accord Bedford v. State*, 293 Md. 172, 173 (1982) (holding that "the extrajudicial identification of an individual's photograph by two victims as that of the culprit who robbed them will support a rational inference of the criminal agency of the accused, notwithstanding the fact that neither of them was able to identify him in court"). Applying the holdings of these cases, we conclude that a rational fact finder could have found beyond a reasonable doubt that, based upon the victim's testimony, appellant was one of the perpetrators of the attack against the victim. Therefore, the evidence of appellant's involvement was sufficient.

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