Circuit Court for Baltimore City
Case No. 617142008

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2288

September Term, 2017

IN RE: T.J.H.

Leahy,
Shaw Geter,
Kenney, James A., III.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: February 4, 2019

The State charged appellant T.J.H., a minor, in the Circuit Court for Baltimore City, sitting as a juvenile court, with acts that would constitute 12 crimes if committed by an adult. The incident that gave rise to the charges occurred in a Baltimore City alley. T.J.H. and another teenage girl surrounded a woman who was alone with her infant baby, demanded money from the woman, and took $40 from the diaper bag the woman had for her child. Then they took the woman's baby and demanded more money. After an adjudicatory hearing, a magistrate judge found sufficient evidence to find T.J.H. involved in the robbery, extortion of money having a value of $40, second-degree assault of Ms. Lopez (merged with robbery), and theft of property having a value under $1,000 (also merged).[1] At the disposition hearing on December 26, 2017, the magistrate found T.J.H. to be delinquent and sentenced her to supervised probation for 18 months.

Before this Court, T.J.H. presents the following two questions for our consideration:

1. "Was the evidence insufficient to support the juvenile court's findings of T.J.H.'s involvement in the delinquent acts of robbery and extortion?"

2. "Were the juvenile court's findings of T.J.H.'s involvement in the delinquent acts of robbery and extortion legally inconsistent?"

We hold that the evidence was sufficient to support a finding, beyond a reasonable doubt, that T.J.H. was involved in robbery. The juvenile court's finding that T.J.H. was involved in extortion cannot stand, however, because there is a material variance between the *allegata* and the *probata*. Even assuming that there is no material variance, we nevertheless hold that the evidence was insufficient to show consent, an element necessary

[1] The juvenile court found that there was no evidence to sustain the other charges.

to support a finding of extortion. In light of our holding on extortion, we decline to address whether the verdicts were inconsistent.

BACKGROUND

T.J.H. was charged on May 22, 2017, with the following acts that would constitute crimes if committed by an adult: (1) attempted kidnapping; (2) false imprisonment; (3) robbery; (4) second-degree assault of Yolanda Lopez; (5) theft of property having a value under $1,000; (6) theft of property having a value under $100; (7) extortion of money having a value of $40; (8) extortion by verbal threat; (9) second-degree assault of Jacob Vardalez; (10) conspiracy to commit kidnapping; (11) conspiracy to commit false imprisonment; and (12) conspiracy to commit robbery.

The Adjudicatory Hearing

On December 12, 2017, the juvenile court held an adjudicatory hearing. The evidence adduced at the hearing comprised testimony from the State's two witnesses, both of whom testified through an interpreter: Yolanda Lopez, the victim, and Noel Armando Bardales Ayala, Ms. Lopez's brother-in-law.[2] The defense did not produce any witnesses, and T.J.H. chose not to take the stand. Accordingly, the following narrative arises out of the witnesses' testimony.

On May 19th, 2017, eighteen-year-old Yolanda Lopez had just picked up her baby from the babysitter after school. While walking home through a Baltimore City alley, two

[2] At the adjudicatory hearing, Ms. Lopez testified that the girls who approached her spoke English. However, she "did know what they were saying to [her] in the beginning." Ms. Lopez testified that she understands English "[a] little bit," although on a day-to-day basis, she speaks Spanish.

girls approached Ms. Lopez from behind and asked her where she was going. Ms. Lopez explained that "[she] didn't pay attention to them because, at first, [she] thought they weren't even talking to [her]. And then they kept following [her], asking [her] many times where [she] was going." After telling the two girls that she was going home, they continued to follow her, and Ms. Lopez testified that

> they started walking next to me, one on one side of me and the other one on the other side. And they asked me for money. And then I said, "No, I don't have any money." And then she said, "Let me see." And one of them grabbed the diaper bag I had for my baby and started to look through it to see if I had any money, and she only found $40. And then they just stayed there, I don't know, and gave back the diaper bag. But I never touched it. She's the one who did everything. I never touched it.

The diaper bag was hanging on the stroller at the time one of the girls grabbed it. After obtaining the $40 from the diaper bag, the confrontation continued and "one [of the girls] started to say, 'I want more money.'" Ms. Lopez replied that she did not have any more money. According to Ms. Lopez, the following interaction took place:

> [T]hey started to touch me a lot and I honestly got very nervous and I was afraid. And I called – no, I wanted to call other people, but there was no one there. And I just wanted to go quickly to see if there was someone who could help me.
>
> And then one of them went in front of me and I had my baby in the carrier, and said, "Okay. I want more money." "I don't have any more money." I didn't know how to tell her in English "just take everything," but I didn't know. I just was showing with gestures. And one of them took my baby and said, "If you don't give me my money, I'm not going to give you your baby." And at that moment, my body got very weak, watery. I don't know how to explain it, but it's a very bad sensation.

At that moment, Ms. Lopez saw her brother-in-law, Bardales Ayala, leaving his home nearby and called out his name for help. Mr. Ayala testified that, he turned when he heard

his name and saw that "two young people . . . were . . . just [walking] away from [Ms. Lopez]."

After Ms. Lopez recounted the incident to her brother-in-law, he followed the two girls for "about one block" into a fast food restaurant and subsequently reported the incident to the police. Mr. Ayala testified that he never lost sight of the two girls, and "kept watching them the whole time that they went in the restaurant . . . through the windows[.]" He watched the girls enter and leave the restaurant through the front entrance, and subsequently enter into the restaurant next door. Mr. Ayala testified, "when one of the police officer[s] asked me where [the girls] were and I said, 'It's the one that's just coming in there.' And at that time is when the other patrol cars saw them and came and went around and captured them [in the back of the restaurant]." When asked on cross-examination whether the police told Ms. Lopez that they recovered the $40, she testified, "No, the police just said -- no, they didn't tell me anything. They just asked me if I recognized them. . . . I don't know if the police found it or not, but, yes, they took it." At trial, both Ms. Lopez and Mr. Ayala identified T.J.H as one of the girls involved in the incident. No evidence was presented distinguishing the actions of T.J.H. from the other girl who participated in the criminal conduct alleged.

After hearing testimony from both witnesses, defense counsel made a motion for judgment of acquittal and argued that the State had not proven all the counts beyond a reasonable doubt. The magistrate denied the motion, stating that it found Ms. Lopez and Mr. Ayala to be "credible witnesses and their testimony, taken together, shows a continuity of observation from the point at which Ms. Lopez was confronted until the point when the

respondent and the other person . . . were arrested by the police." After each party gave their respective closing arguments, the magistrate found T.J.H involved in robbery, extortion, second-degree assault, and theft of property having a value under $1,000.

In a subsequent disposition hearing dated December 26, 2017, the juvenile court found T.J.H to be delinquent and ordered her to 18 months' supervised probation. T.J.H noted her timely appeal to this Court on January 24, 2018. We shall furnish additional facts as necessary throughout our discussion.

DISCUSSION

I.

On appeal, T.J.H. argues that the evidence was insufficient to support the juvenile court's finding of her involvement in both robbery and extortion.

Maryland has adopted a separate system for juvenile offenders that is civil in nature. *In re Areal B.*, 177 Md. App. 708, 714 (2007). A "[d]elinquent child" is defined as "a child who has committed a delinquent act and requires guidance, treatment, or rehabilitation." Maryland Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 3-8A-01(m). A "delinquent act" is "an act which would be a crime if committed by an adult." CJP § 3-8A-01(l). Accordingly, "the allegations in the petition that the child has committed a delinquent act must be proved beyond a reasonable doubt." CJP § 3-8A-18(c)(1); Md. Rule 11-114(e)(1).

When faced with a challenge to the sufficiency of the evidence in a juvenile case, as in any other criminal case, we determine "'whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.'" *In re Kevin T.*, 222 Md. App. 671, 676-77 (2015) (quoting *In re Anthony W.*, 388 Md. 251, 261 (2005)); *see also Perry v. State*, 229 Md. App. 687, 689 (2016) (quoting *State v. Smith*, 347 Md. 527, 533 (2003)). The question before us is a narrow one; it does not ask "whether the evidence *should have* or *probably would have* persuaded the majority of fact finders but only whether it *possibly could have* persuaded *any* rational fact finder." *Smith v. State*, 232 Md. App. 583, 594 (2017) (quoting *Allen v. State*, 158 Md. App. 194, 249 (2004) (internal quotation marks omitted)). We also "defer to the fact-finder's decision on which evidence to accept and which inferences to draw when the evidence supports differing inferences." *Morris v. State*, 192 Md. App. 1, 30 (2010) (citation omitted). We will not disturb these findings of fact unless they are clearly erroneous. *In re Kevin T.*, 222 Md. App. at 677.

A. Robbery

At the adjudicatory hearing, the magistrate found T.J.H. involved in robbery based on the following finding:

> Count number three is robbery. Robbery is taking somebody's property through the use or the threat of force. Ms. Lopez testified that $40 was taken from her. She described how the respondent and this other young lady, who is never really identified in the State's case, in [T.J.H's] case here, were on two sides of Yolanda. She made it clear that she felt intimidated. She wasn't sure what they were saying, but she had enough understanding of the situation to know that she felt threatened by what the girls were doing. They went through her diaper bag. They took the $40. She did not resist.

Before this Court, T.J.H. argues that the State's evidence was insufficient to support the juvenile court's finding of her involvement in robbery. Pointing out that there are two "modalities" of robbery—commonly referred to as the force modality and the intimidation

modality—T.J.H. contends that the evidence "does not support the intimidation modality of robbery[] because a reasonable person in Ms. Lopez's position would not have been 'in fear of bodily harm.'" Specifically, T.J.H. avers, that both before and during the taking of Ms. Lopez's $40, "[t]here was no *demand* for money; there was no implication of a weapon; and there were no threats of any kind." T.J.H. notes that Ms. Lopez testified that she was intimidated only *after* the taking of the $40, making that testimony irrelevant to the robbery analysis. T.J.H. also argues that the State's evidence was insufficient to support the force modality of robbery because "Ms. Lopez did not resist; was not injured; and the force used was that, and only that, necessary to remove the money from Ms. Lopez's possession."

In response, the State concedes that there was no evidence to support the force modality of robbery. The State maintains, however, that the threats and demand for money were implicit in T.J.H.'s conduct. The State argues, further, that the juvenile court was "not limited to Lopez's precise words . . . [and] could consider the way in which she relayed the events [in her testimony]." The State argues, therefore, that Ms. Lopez's testimony supported a reasonable inference that "Lopez felt intimidated because a reasonable person under the same circumstances would have felt intimidated."

The State filed a juvenile petition in the circuit court charging T.J.H. with violating Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL"), § 3-402(a), which provides that "[a] person may not commit or attempt to commit robbery." In Maryland, robbery stems from the common law, and is defined as "the felonious taking and carrying away of the personal property of another from his person by the use of violence or by

putting in fear." *Hall v. State*, 233 Md. App. 118, 138 (2017) (quoting *Metheny v. State*, 359 Md. 576, 605 (2000) (internal quotation marks omitted)); *Montgomery v. State*, 206 Md. App. 357, 386 (2012). Robbery is distinguished from larceny or theft by the element of "force or threat of force, the latter of which also is referred to as intimidation." *Spencer v. State*, 422 Md. 422, 428-29 (2011) (internal quotation marks omitted). Thus, common-law robbery requires the State to prove either the use of actual force or the threat of force. *See Spencer*, 422 Md. at 428-30. Because the parties agree that there was insufficient evidence to support a finding of actual force, the question before us is whether there was sufficient evidence of threat of force, or intimidation, to support the juvenile court's finding of T.J.H.'s involvement in robbery.

In determining whether there has been a threat of force or intimidation, an objective test "focusing on the accused's actions" must be applied. *Montgomery*, 206 Md. App. 387 (quoting *Spencer*, 422 Md. at 432). This test considers "whether an ordinary, reasonable person under the circumstances would have been in fear of bodily harm." *Spencer*, 422 Md. at 434. As such, proof of actual fear and the actual display of a weapon are not necessary "if the means employed are calculated to instill fear in the heart or mind of a reasonable man[,]" *Id*. (quoting *Hayes v. State*, 211 Md. 111, 116 (1956) (internal quotations omitted)); *Dixon v. State*, 302 Md. 447, 461 n.8 (1985), and, if the circumstances "reasonably . . . cause the owner to surrender his property." *Spence v. State*, 51 Md. App. 359, 361 (1982), *rev'd on other grounds*, 296 Md. 416 (1983) (internal quotations omitted).

Here, Ms. Lopez testified that while walking home in an alley with only her infant son, T.J.H. and the other girl approached her from behind and asked multiple times where

she was going. After telling the girls that she was going home, they continued to follow Ms. Lopez and surrounded her, one girl standing on each side as they asked her for money. Ms. Lopez testified that after telling the girls that she did not have any money, one of the girls stated "[l]et me see[,]" and grabbed Ms. Lopez's diaper bag from the stroller and searched it until she found the $40. She testified, further, that she "never touched" the diaper bag when it was taken from her possession.

These facts and circumstances, and the reasonable inferences deducible therefrom, were found by the juvenile court as showing the intimidation element of robbery. We cannot say that the magistrate's conclusion was clearly erroneous. Although Ms. Lopez testified that the girls "asked" for money, the girls did so while physically surrounding Ms. Lopez and her infant child in an alley with no one else around. A reasonable person in Ms. Lopez's position could have interpreted the actions of T.J.H. and her accomplice as both an intimidating demand for money *and* a threat of bodily harm to her and her infant. *See Spencer*, 422 Md. at 435; *see also State v. Rusk*, 289 Md. 230, 246 (1981) ("That threats of force need not be made in any particular manner in order to put a person in fear of bodily harm is well established. Indeed, conduct, rather than words, may convey the threat.") (citation omitted). Additionally, contrary to T.J.H.'s assertions, it is insignificant that Ms. Lopez did not expressly testify that she was "afraid" or "nervous" before or during the robbery. Moreover, considering that Ms. Lopez is not fluent in English, she struggled to relate at the end of her statement about the events that "at that moment, my body got very weak, watery. I don't know how to explain it, but it's a very bad sensation." As the Court of Appeals said in *Coles v. State*, "[t]hat [the victim] did not explicitly testify that she was

afraid is of little consequence. . . . [P]roof of actual fear is not necessary when 'intimidation . . . is the gravamen of the action.'" 374 Md. 114, 129 (2003) (quoting *Dixon*, 302 Md. at 459)).

Viewing all the evidence and the rational inferences that arise therefrom in the light most favorable to the State, we hold that there was sufficient evidence that "possibly could have persuaded any rational fact finder," that T.J.H. was involved in robbery beyond a reasonable doubt. *Smith*, 232 Md. App. at 594 (emphasis omitted).

B. Extortion

T.J.H. argues that the evidence was insufficient to prove the act of extortion because there was no evidence that Ms. Lopez *consented*, as required under CL § 3-701(b), to giving the $40 to T.J.H., and that the girls' conduct prior to the removal of the $40 did not constitute a threat of 'force' or 'violence' under CL § 3-701(b)(1), or 'economic injury' under CL § 3-701(b)(2). In addition, T.J.H. also argues that the juvenile court's finding of extortion "represents a material variance from the charging document." T.J.H. contends that the charging document "specified the modality of extortion—completed rather than attempted—and it specified the property that was involved—the $40." She argues, however, that the "modality that was charged" varies with "the conduct on which the court based its finding—taking the baby and telling Ms. Lopez that he would not be returned until she gave the girls more money[.]" According to T.J.H, the magistrate "apparently recognize[ed] that the removal of the $40 from Ms. Lopez's bag was not extortion" and "based his recommendation of T.J.H.'s involvement in count 7 on conduct that allegedly occurred *after* the $40 was taken."

The State responds that a charging document's purpose is to put a defendant on notice of prosecution, and "Count 7 put T.J.H. on notice that she was being charged with extortion under CL 3-701, which prohibits both a threat to obtain and a threat to attempt to obtain property." The State maintains, further, that both the Statement of Charges, which was read aloud in open court at T.J.H.'s detention review hearings, and the other counts in the petition, involved T.J.H.'s conduct after the taking of the $40. According to the State, since "none of the concerns that underlie the notice requirement are present here," there was no material variance between the charging document and the evidence that T.J.H. attempted to obtain Lopez's money by extortion. The State concludes that "[t]he gravamen of extortion, as relevant to this case, is actual or threatened force to induce the victim to give up something of value. Whether or not property was obtained is immaterial."

Preliminarily, we must address the issue of whether T.J.H.'s claim of material variance is properly before this Court. Ordinarily, in a jury trial, such a claim must be raised in the trial court. *Green v. State*, 23 Md. App. 680, 685 (1975) (citations omitted). T.J.H. did not raise the issue of material variance by a timely motion for judgment of acquittal before the juvenile court. But T.J.H.'s material variance argument is essentially a challenge to the sufficiency of the evidence in a juvenile delinquency proceeding. *C.f. Green*, 23 Md. App. at 685 (explaining that a preserved material variance argument becomes a matter of the sufficiency of the evidence). And, in juvenile delinquency proceedings, which are tried without a jury, a defendant is "not required to make a motion for judgment of acquittal . . . in order to preserve his right to appellate review of the

sufficiency of the evidence." *In re Antoine M.*, 394 Md. 491, 501-503 (2006). We conclude, therefore, that this issue is properly before us.

Turning to the merits, we note that Count 7 of the Juvenile Petition alleged that T.J.H. "[d]id *obtain* by extortion money having a *value of $40.00* U.S. Currency from Yolanda Lopez, the owner thereof, in violation of Criminal Law Article, Section 3-701[.]" (Emphasis added).

Regarding Count 7, the juvenile court found as follows:

> Count 7 is extortion. Count eight [extortion by verbal threat] is a form of extortion that is very particularized; that is, an intent to extort money or something from another person through verbally threatening to cause injury. There was no verbal threat of injury. *What there was, was taking the baby and saying that the baby would not be given back without the money.* Again, there was this language barrier, but Ms. Lopez said that she understands English better than she speaks it and I'm going to find that I am persuaded that she was accurate in her understanding that when one of the *two girls* – and it was not specified which of the two did it – *took the baby and said that she wouldn't give the baby back without money; that that is sufficient to prove the count of extortion* because, even though there is not an expressed verbal threat, there is a threat of some sort that's directed to another person, the baby; not that the baby was threatened with harm, but that the possession of the baby was the threat that was being used in this case to extort money from Ms. Lopez.

(Emphasis added). On that basis, the juvenile court concluded that the "facts [we]re sustained in count seven[.]"

CL § 3-701 provides, in relevant part:

> (b) *Obtaining or attempting to obtain property prohibited.* — A person may not obtain, *attempt to obtain*, or conspire to obtain money, property, labor, services, or anything of value from another person with the person's consent, if the consent is induced by wrongful use of actual or threatened:
>
> (1) force or violence;
>
> (2) economic injury; or

> (3) destruction, concealment, removal, confiscation, or possession of any immigration or government identification document with intent to harm the immigration status of another person.

(Emphasis added). Maryland's extortion statute "punishes the extortive threat, not the actual attainment of money (or thing of value)." *Rendelman v. State*, 175 Md. App. 442, 435 (2007) (citing *Iozzi v. State*, 5 Md. App. 415, 419 (1968)). The element of consent is also essential to the crime of extortion, and is what distinguishes extortion from the crime of robbery.[3] *Ocasio v. United States*, 578 U.S. ___, ___, 136 S. Ct. 1423, 1435 (2016) ("As used in the Hobbs Act, the phrase 'with his consent' is designed to distinguish extortion . .

[3] In *Rendelman v. State*, 175 Md. App. 422 (2007), we explained that the Maryland general extortion statute is patterned after the federal Hobbs Act, 18 U.S.C. § 1951 (2000). 175 Md. App. 422, 437. Accordingly, we looked to the federal courts of appeal as persuasive authority on the application of CL § 3-701. *Id*. at 438-42, 444. The Second Circuit in *U.S. v. Zhou*, 428 F.3d 361 (2d. Cir. 2005), elaborated on the "consent" element of extortion under the Hobbs Act. The Second Circuit explained:

> *Choice on the part of the victim is a common theme in all extortion cases*. . . . Indeed, "the legislative history of the Act makes clear that its proponents understood extortion to encompass situations in which *a victim is given the option* of relinquishing some property immediately or risking unlawful violence resulting in other losses, and he simply *chooses* what he perceives to be the lesser harm." "In order to foreclose any argument by an extortionist that the relinquishment of property in such circumstances was truly voluntary, however, the Hobbs Act definition of extortion *simply prohibits the extortionist from forcing the victim to make such a choice*."
>
> At bottom, undeniably the victim of an extortion acts from fear, whether or violence or exposure. But both the language of the statute and the relevant precedents make clear that he or she *always retains some degree of choice in whether to comply with the extortionate threat, however much of a Hobson's choice that may be. Indeed, this element of consent is the razor's edge that distinguishes extortion from robbery*[.]

Id. at 371 (third emphasis in original) (alterations and internal citations omitted).

. from robbery[.]"); *accord Rendelman v. State*, 175 Md. App. 422, 444 (2007) ("CL Section 3-701 was patterned after the Hobbs Act[.]").

Although juvenile causes are civil proceedings, "many of the constitutional safeguards afforded criminal defendants are applicable to juveniles." *In re Areal*, 177 Md. App. at 714 (internal quotations omitted). "[A] juvenile alleged to have engaged in a delinquent act is entitled to adequate notice of the allegations against him or her under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and under Article 21 of the Maryland Declaration of Rights.[4] *Id*. at 715-16. This safeguard is reflected in CJP § 3-8A-13(a), which states that juvenile petitions shall "set forth in clear and simple language the alleged facts which constitute the delinquency, and shall also specify the laws allegedly violated by the child." Similarly, Maryland Rule 11-103 provides that a juvenile petition shall state, among other things, "[t]he facts, in clear and simple language, on which the allegations are based." The Court of Appeals in *Ayre v. State*, 291 Md. 155 (1981), elaborated on the purposes served by charging documents:

> (i) to put the accused on notice of what he is called upon to defend by characterizing and describing the crime and conduct; (ii) to protect the accused from a future prosecution for the same offense; (iii*) to enable the defendant to prepare for his trial*; (iv) *to provide a basis for the court to consider the legal sufficiency of the charging document*; and (v) to inform the court of the specific crime charged so that, if required, sentence may be pronounced in accordance with the right of the case.

Id. at 163 (emphasis added).

[4] Article 21 of the Maryland Declaration of Rights provides, in part, "[t]hat in all criminal prosecutions, every man hath a right to be informed of the accusations against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence[.]"

In general, "matters essential to the charge must be proved as alleged in the indictment. The evidence in a criminal trial must not vary from those allegations in the indictment which are essential and material to the offense charged." *Smith v. State*, 232 Md. App. 583, 594 (2017) (internal citations and brackets omitted). Therefore, we must reverse a judgment if a material variance exists between the *allegata* (the allegations in the pleading) and the *probata* (the proof at trial). *Id*. at 595 (quoting *Green*, 23 Md. App. at 685). "[A] variance is material if it operated to the defendant's surprise, prejudiced the defendant's rights, or placed the defendant at risk of double jeopardy." 41 Am. Jur. 2d, *Indictments and Information*s § 244 (2d ed., 2018 update).

In *McDuffy v. State*, 6 Md. App. 537, 538 (1969), this Court addressed whether a defendant can be "convicted of forging a receipt under an indictment which charges him with forging a credit card." Specifically, the indictment charged McDuffy with forgery of an American Oil credit card, but testimony established that McDuffy had forged a receipt for purchased merchandise instead. *Id*. In reversing McDuffy's forgery conviction, this Court wrote:

> We do not think it requires a citation of authority to support the proposition that an individual cannot be convicted of forging one instrument when the proof shows that he forged an entirely different instrument.

Id. at 538-39.

Recently, we clarified the applicability of *McDuffy* in *Smith*, 232 Md. App. at 595-96. Smith appeared before a District Court Commissioner following his arrest on a warrant. *Id*. at 587. After the commissioner imposed money bail as a condition of Smith's pre-trial release, he angrily shouted at the commissioner. *Id*. As a result, Smith was

charged with threatening a State or local official with bodily harm under CL § 3-708(b), which prohibits threats to "take the life of, kidnap, or cause physical injury[.]" *Id*. at 594-95. On appeal, Smith argued that there was "insufficient evidence to convict him for threatening a State official" because there was a material variance between the elements alleged and the evidence presented. *Id*. at 594-95. Relying on *McDuffy*, Smith asserted that "the State specified the distinct type of injury threatened, bodily harm . . . but that the State then failed to present any evidence that Smith threatened bodily injury." *Id*. at 595. In rejecting Smith's argument under *McDuffy*, we explained,

> Smith misinterprets *McDuffy*, stating that the *allegata* was "bodily harm" but the *probata* were nonspecific words. ***McDuffy* would apply if the State had charged Smith with threatening bodily injury (the *allegata*), but at trial, it attained a conviction by proving that he threatened kidnapping (the *probata*).** That is not the case.
>
> Rather, what Smith is asserting is that the State failed to present adequate evidence that the words Smith communicated to Caron threatened bodily injury.
>
> * * *
>
> While Smith correctly identifies examples of harm that a jury could infer from the statement, he fails to recognize that his burden is to persuade that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when considering the statements and circumstances.

Id. at 595-96 (emphasis added) (citations omitted). Accordingly, viewing the evidence in the light most favorable to the State, we held that "a reasonable jury could have found that Smith threatened Caron with bodily harm." *Id*. at 596-97 (citations omitted).

With these principles in mind, we return to the case at bar and conclude that the *McDuffy* rationale applies to the *allegata* and the *probata* here. Count 7 of the Juvenile Petition alleged that T.J.H. "[d]id obtain by extortion money having a value of $40.00 U.S.

Currency from Yolanda Lopez, the owner thereof, in violation of Criminal Law Article, Section 3-701[.]" In other words, the count alleged that the acts which led T.J.H. to obtain the $40 from Ms. Lopez constituted the extortive threat (*i.e.*, surrounding Ms. Lopez and asking for money). *See Melia v. State*, 5 Md. App. 354, 361 (1968) (construing the count as alleging facts at variance with the proof at trial). At the adjudicative hearing, however, the State proved a different extortive threat—T.J.H's use of Ms. Lopez's baby in an *unsuccessful* attempt to induce Ms. Lopez to give more money—*after* T.J.H. had already taken the $40 from Ms. Lopez. Thus, the variance between the *allegata* and the *probata* exists not in the type of property extorted, as the State avers, but in the extortive threat being "punished." *Rendelman*, 175 Md. at 435.

Proof of the extortive threat is an essential element of extortion. *Id*. Moreover, the variance is material because the count alleged an extortive threat entirely different from that proved. *Id*; *Ayre*, 291 Md. at 163. Although the State argues that T.J.H. was put on notice of an attempted extortion charge because the count generally referenced CL § 3-701, "[i]t is settled that the scope of the charge is limited by the *allegation* in the document, *not by the statutory citation*." *In re Areal*, 177 Md. App. at 714 (emphasis added); *see also Thompson v. State*, 371 Md. 473, 489 (2002) ("The character of the offense is determined by what is stated in the body of an indictment, not the statutory reference or caption.") (internal quotations omitted); *Ayre*, 291 Md. at 155 n.9 (stating that the statutory caption in a charging document "exists as a matter of convenience to the parties and the court, and thus possesses no substance of its own").

Even assuming that there was no material variance, we conclude that the State failed to present evidence sufficient to establish the consent element of extortion. *Smith*, 232 Md. App. at 594 (emphasis omitted). As discussed, consent is what distinguishes the crime of extortion from robbery. *Ocasio*, 136 S. Ct. at 1435. The State in the instant case presented evidence that T.J.H. and the other girl surrounded Ms. Lopez as they asked her for money. When Ms. Lopez denied having money, one of the girls *immediately* grabbed Ms. Lopez's diaper bag from the stroller, rummaged through it, and obtained the $40. There is no evidence from which a rational trier of fact could have drawn the reasonable inference that Ms. Lopez chose, let alone had the option to choose, to consent to the taking of the $40 from a bag that was snatched from her stroller. *See U.S. v. Zhou*, 428 F.3d 361, 371 (2d. Cir. 2005) ("Choice on the part of the victim is a common theme in all extortion cases"). Without any evidence that Ms. Lopez consented to T.J.H. taking her diaper bag or the $40 it contained, we hold that the evidence was insufficient for a fact finder to conclude beyond a reasonable doubt that T.J.H. was involved in extortion. *Smith*, 232 Md. App. at 594.

Because we reverse the juvenile court's finding that T.J.H. was involved in extortion, we need not address T.J.H.'s argument that the extortion verdict was inconsistent with the robbery verdict. The transcript of the sentencing hearing does not disclose whether or to what degree the extortion verdict affected the juvenile court's determination to sentence T.J.H. to a single sentence of 18 months' probation. Accordingly, we will remand the case to give the juvenile court the opportunity to reconsider its sentence in light of our holding. We leave the decision of whether to reduce T.J.H.'s sentence to the juvenile court's sound discretion.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY SITTING AS A JUVENILE COURT, AFFIRMED AS TO FINDING OF ROBBERY, REVERSED AS TO FINDING OF EXTORTION; APPELLANT TO PAY 50% OF COSTS; APPELLEE TO PAY 50% OF COSTS.