

**IN THE
COURT OF SPECIAL APPEALS OF MARYLAND**

September Term 2019

No. 1253

IN RE: S.B.

On Appeal from the Circuit Court for Baltimore City
(Hon. Emanuel Brown, presiding)

REPLY BRIEF OF APPELLANT

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In this case, S.B. was adjudicated delinquent in a proceeding that violated basic notions of due process and fundamental fairness. S.B. established in his opening brief that longstanding due process principles preclude a reviewing court from reversing a magistrate's outcome-determinative credibility findings without hearing the live testimony in person. He also established that the circuit court in his case violated his due process rights by rejecting the magistrate's credibility findings on a cold record and reversing the magistrate's resulting recommendation that the State had not proven the charges against him beyond a reasonable doubt.

By wholly failing to respond to S.B.'s constitutional argument, the State effectively has conceded that due process guarantees a juvenile in a delinquency proceeding the right to reliable factfinding—and that a court's reversal of a presiding magistrate's outcome-determinative credibility determinations is not reliable if the court did not witness the live testimony first-hand. The State instead stakes its case on the contention that the circuit court in this case did not reject the magistrate's credibility determinations. But the orders issued by the magistrate and circuit court flatly contradict that assertion. This court therefore should reverse the circuit court's order and remand with instructions to adopt the magistrate's recommendation.

ARGUMENT

I. The State Does Not Contest That A Circuit Court’s Reversal Of A Magistrate’s Credibility Determinations Without Seeing The Live Testimony Violates Due Process

As S.B. established in his opening brief (at 16-22), it is beyond question that juvenile adjudication proceedings “must measure up to the essentials of due process and fair treatment” under the U.S. and Maryland Constitutions. *In re Gault*, 387 U.S. 1, 30 (1967) (quoting *Kent v. United States*, 383 U.S. 541, 562 (1966)); see *In re Thomas J.*, 372 Md. 50, 65-66 (2002) (Article 24 of the Declaration of Rights requires that children in juvenile proceedings be afforded “fundamental fairness”).

Critical to this due process guarantee is the reliability of the factfinding process, which is undermined when a reviewing court that did not observe the live witness testimony reverses the credibility determinations of a magistrate who did. See *United States v. Raddatz*, 447 U.S. 667, 679 (1980); *Wenger v. Wenger*, 42 Md. App. 596, 604 (1979) (recognizing that the presiding magistrate is in the best position to judge witness credibility because he “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”). For this reason, fundamental principles of due process prohibit a trial court from reversing a magistrate’s outcome-determinative credibility assessments without hearing the live testimony first-hand. See, e.g., *Jackson v. United States*, 859 F.3d 495 (7th Cir. 2017); *United States v. Hernandez-Rodriguez*, 443 F.3d 138 (1st Cir. 2006);

United States v. Ridgway, 300 F.3d 1153 (9th Cir. 2002); *United States v. Cofield*, 272 F.3d 1303 (11th Cir. 2001); *Cullen v. United States*, 194 F.3d 401 (2d Cir. 1999); *Hill v. Beyer*, 62 F.3d 474 (3d Cir. 1995); *Louis v. Blackburn*, 630 F.2d 1105 (5th Cir. 1980).

The State disputes none of this. It has no answer to the obvious due process problems that arise when a child is subjected to a delinquency adjudication—“comparable in seriousness to a felony prosecution,” *Gault*, 387 U.S. at 36—the factfinding procedures of which are insufficiently reliable. And it does not contest that a trial court’s reversal of a magistrate’s outcome-determinative credibility assessments without hearing the live testimony first-hand renders the factfinding process insufficiently reliable in violation of a child’s due process rights. The State thus effectively has conceded these points.

Instead of contesting S.B.’s due process argument, the State (at 22-26) emphasizes that magistrates do not have authority to enter final judgments and recites the applicable standard of review: The circuit court reviews the magistrate’s factual determinations for clear error, and this Court reviews the circuit court’s ultimate determination for abuse of discretion. But the standard of review has no bearing on whether *due process* was satisfied in this case, which is a distinct question governed by the Constitution. Indeed, in the federal system, magistrate judges generally do not have authority to enter final judgments, and their factual findings are generally reviewed for clear error, but court after court has found that a reviewing court may not reverse a magistrate judge’s credibility determinations without first seeing the live

testimony. *See* 28 U.S.C. § 636 (setting forth a magistrate judge’s authority); *Jackson*, 859 F.3d at 498-499 (collecting cases). The process followed in S.B.’s case, in which a circuit court judge who did not see the live testimony rejected the magistrate’s credibility determinations and entered a judgment of “facts sustained” against S.B. contrary to the magistrate’s recommendation, fell well short of the due process to which S.B. was entitled.¹

II. The Circuit Court Impermissibly Reversed The Magistrate’s Outcome-Determinative Credibility Findings In This Case

To avoid reversal based on the glaring due process issue presented in this case, the State insists that “[t]he circuit court did not reject the magistrate’s credibility findings, nor did those findings dictate the outcome of the attempted robbery and related charges against S.B. and K.R.” State Br. 21. But, as S.B. established in his opening brief (at 23-25), that assertion is incorrect.

In analogous contexts, other courts have explained that determining whether a court has made findings “inconsistent with credibility choices made by the magistrate is a two-step process.” *Proffitt v. Wainwright*, 685 F.2d 1227, 1237 (11th Cir. 1982) (internal quotation marks omitted). First, this court “must review the magistrate’s

¹ The State likewise does not contest that state law and double jeopardy principles prohibit a remand for a de novo hearing to allow the circuit court judge to assess the witnesses’ credibility in this case. *See* S.B. Br. 25-26 n.5. Accordingly, for this reason and the additional reasons explained in S.B.’s opening brief (at 26, 30-31) and *infra* p. 13, the proper remedy for the due process violation in this case is a remand with instructions to adopt the magistrate’s recommendation that S.B. be found “facts not sustained” on all counts.

recommendation and decide whether credibility choices he made ... were dispositive.” *Id.* Second, “[i]f the answer is affirmative,” the court “must then scrutinize the [circuit] court’s order to ascertain if the judge’s rejection of the magistrate’s recommendation was also a rejection, whether express or implicit, of the magistrate’s credibility choices.” *Id.*; see also *United States v. Scribner*, 832 F.3d 252, 259 (5th Cir. 2016) (“A [circuit] court not only errs ... by expressly rejecting a magistrate judge’s credibility findings but also by ‘accept[ing] the magistrate judge’s decision ... as to credibility, [but] then dr[awing] different inferences from’ testimony found to be credible.” (quoting *Louis*, 630 F.2d at 1107)).

This case boiled down to a choice between differing versions of events described by the two primary witnesses, T.N., who was one of the boys with S.B. in the parking garage on the day of the incident, and John McDaniel, who was the alleged victim. The magistrate’s recommendation that S.B. be found “facts not sustained” on all counts depended on the magistrate’s determination that T.N.’s account of the encounter with McDaniel was more credible; the circuit court’s final judgment of “facts sustained” necessarily rested on a rejection of those credibility determinations in violation of S.B.’s due process rights.

A. The Magistrate’s Recommendation That S.B. Be Found “Facts Not Sustained” On All Charges Rested On Express Findings That T.N.’s Testimony Was Credible

The magistrate’s conclusion that the State failed to prove its case against S.B. beyond a reasonable doubt rested on several express findings that T.N.’s testimony

was more credible than McDaniel's. The State argues that "[t]he magistrate's credibility findings were limited to a portion of T.N.'s testimony involving T.N.'s assault on McDaniel" and were "not critical to whether S.B. or K.R. tried to rob McDaniel." State Br. 21, 32 (internal quotation marks omitted). But that characterization is demonstrably false: The magistrate's credibility findings dictated his conclusion that the State failed to prove *all* charges against S.B.

S.B. was charged with five counts arising from the parking garage encounter with McDaniel: (1) attempted robbery of McDaniel; (2) conspiring with T.N. and K.R. to rob McDaniel; (3) assault of McDaniel; (4) attempted theft from McDaniel of property having a value of at least \$100 but less than \$1,500; and (5) attempted theft of the truck McDaniel was driving or the property therein while unlawfully being in or on the truck. Juvenile Pet., *In re S.B.*, at 1-2 (May 9, 2018). These charges arose from a common constellation of facts. As the magistrate explained, "[t]he State argued that [S.B. and K.R.] were lying in wait for someone to come into that part of the garage. The State argued that [S.B. and K.R.] intended that [T.N.] assault [McDaniel] by surprise and that [S.B.] and [K.R.] would then steal something from [McDaniel]." App. 13.

Explicitly crediting T.N.'s testimony and finding it "more persuasive" than McDaniel's testimony, App. 13, the magistrate found that the State's version of events did not occur and specifically rejected the State's acting-in-concert theory. First, the magistrate determined that the State could not prove the robbery and theft counts

against S.B. beyond a reasonable doubt. In particular, he found that T.N.'s assault of McDaniel was triggered not by the boys' desire to rob McDaniel, but instead by McDaniel calling T.N. a racial slur:

On the key issue of what led to the assault, I believed [T.N.'s] testimony. I did not believe Mr. McDaniel's testimony. In my opinion, Mr. McDaniel called [T.N.] a racially offensive name and [T.N.] retaliated by assaulting Mr. McDaniel. I believed [T.N.'s] testimony that neither [S.B.] nor [K.R.] struck or touched Mr. McDaniel.

App. 12 (emphases added). The magistrate further explained that, with respect to the robbery and theft counts:

While it is possible that Mr. McDaniel's testimony more accurately portrayed what happened than [T.N.'s] testimony, I found [T.N.'s] testimony to be more persuasive. I am unable to find, beyond a reasonable doubt, facts sustained on any of the counts of robbery, attempted robbery, theft, attempted theft, and related charges.... I conclude as a matter of law that the State failed to meet its burden regarding those counts.

App. 13 (emphasis added). The magistrate therefore “recommend[ed] that the court find facts not sustained on all of the theft and robbery counts for both [K.R.] and [S.B].” App. 14.

Again crediting T.N.'s testimony, the magistrate next found that the State also could not meet its burden of proof on the assault charge against S.B.: “I find that the evidence does not support a finding that either [S.B.] or [K.R.] struck Mr. McDaniel. *I believe [T.N.'s] description of the assault.* He testified that neither [S.B.] nor [K.R.] struck Mr. McDaniel.” App. 14 (emphasis added). The magistrate then determined that the State also had not proven the assault charge on a conspiracy theory, emphasizing that

the State “offered no evidence in support of that theory which was not also evidence of assault.” App. 14. Rejecting that S.B. or K.R. were accomplices to T.N., and again relying on T.N.’s testimony, the magistrate found there was no concerted action between T.N., S.B., and K.R. as the State had argued:

I conclude that [T.N.] struck Mr. McDaniel spontaneously when Mr. McDaniel called him a “black bitch.” There is no evidence that either [S.B.] or [K.R.] expected this. They were surprised when [T.N.] bit Mr. McDaniel. They did not act in concert with [T.N.]. They did not assist [T.N.]. They were not complicit with [T.N.]. There is not enough evidence to find, beyond a reasonable doubt, that either [S.B. or K.R.] assaulted Mr. McDaniel.

App. 14 (emphases added).

B. The Circuit Court Necessarily Rejected The Magistrate’s Credibility Findings When It Reversed The Magistrate’s Recommendation

The circuit court necessarily rejected the magistrate’s credibility determinations when it reversed the magistrate’s recommendation and found that the State had proven the charges against S.B. beyond a reasonable doubt.

1. Robbery And Theft Charges

The circuit court found that the State had proven beyond a reasonable doubt three of the four robbery counts against S.B., explaining that “*this Court finds Mr. McDaniel’s testimony credible* with respect to the allegations of attempted robbery.” App. 19 (emphasis added). This finding directly conflicts with the magistrate’s statement that he “*found [T.N.’s] testimony to be more persuasive*” than McDaniel’s on those counts. App. 13 (emphasis added). See *United States v. Powell*, 628 F.3d 1254, 1257 n.8 (11th

Cir. 2010) (“[T]he District Court expressly stated that it was not disputing the magistrate’s credibility findings. But it credited the view of witnesses whom the magistrate found unconvincing and drew different inferences than the magistrate judge on the basis of that testimony. Therefore, the District Court, by necessary implication, rejected the magistrate judge’s credibility determination.”).

The State nonetheless argues (at 21) that the circuit court did not reverse the magistrate’s credibility determination on the robbery and theft counts because “[t]he magistrate’s credibility findings were limited to a portion of T.N.’s testimony involving T.N.’s assault on McDaniel,” and “[t]he circuit court did not make its ‘facts sustained’ determination that S.B. and K.R. were involved in attempted robbery and related offenses by rejecting those credibility findings.” That contention lacks merit for several reasons. First, as discussed above, the State argued before the magistrate that the boys acted in concert in an attempt to ambush McDaniel and assault him in furtherance of a scheme to rob him. App. 13. The magistrate’s conclusion that he “believed [T.N.’s] testimony” “[o]n the key issue of what led to the assault” was therefore a finding that T.N.’s decision to punch McDaniel was not part of a larger plan to rob McDaniel. App. 12. The magistrate made this clear when he found that neither S.B. nor K.R. expected T.N.’s assault on McDaniel, and explicitly found that “[t]hey did not act in concert with [T.N.]. They did not assist [T.N.]. They were not complicit with [T.N.].” App. 14.

Second, the State argues (at 27-28) that the circuit court appropriately relied on the surveillance video to corroborate McDaniel's testimony and determine that it was more credible on the attempted robbery and related counts. Putting aside the fact that the footage "did not capture the actual encounter between the three young men and Mr. McDaniel," App. 18, that finding directly contradicts the magistrate's finding, based on T.N.'s testimony, that the three boys were not working in concert to commit or attempt to commit a robbery. App. 13-14. The magistrate's finding that T.N.'s testimony was "more persuasive" than McDaniel's on the key facts about the encounter with McDaniel, App. 13, left no room for the circuit court to make a different and inconsistent finding based on surveillance video that did not depict the incident.

Third, the State, quoting the circuit court, asserts that "[w]hether Mr. McDaniel called [T.N.] a racially offensive term, which purportedly precipitated a separate assault[,] is not part of this Exception regarding [S.B.] and [K.R.]" State Br. 21 (quoting App. 19). According to the State, this statement means that the circuit court did not reject that credibility determination when it found "facts sustained" against S.B. on the robbery and theft counts. The State, however, misreads that language. Although S.B. and K.R. were both charged with assault arising from the same constellation of facts as the robbery and theft charges (Count 3), K.R.—but not S.B.—was also charged with a second, separate assault (Count 6). *See* App. 20. As to that separate assault, the circuit court found "facts not sustained" on the ground that

there was “[i]nsufficient evidence that [K.R.] committed an assault *beyond the Attempted Robbery.*” *Id.* (emphasis added). The circuit court’s statement that what precipitated “a separate assault is not a part of this Exception regarding [S.B.] and [K.R.],” App. 19, therefore, appears to be a reference to the separate assault charged against K.R. in Count 6. It was not a reference to the alleged assault the State claimed was part of the attempted robbery and related offenses, or a reason not to consider the magistrate’s credibility findings regarding T.N.’s testimony about what gave rise to those charges. Indeed, the State’s own memorandum in support of its exception made clear that the assault charged against S.B. *was* part of the exception. *See* State’s Mem. in Support of State’s Exception on the Record, at 4 (Mar. 1, 2019) (arguing that the magistrate “should have found Respondents [K.R.] and [S.B.] facts-sustained for Attempted Robbery, Attempted Theft, *Assault*, and other related charges” (emphasis added)).

Finally, the State suggests (at 27-28) that the magistrate’s inability to resolve the discrepancy between T.N.’s and McDaniel’s testimony about whether S.B. and K.R. had contact with the truck somehow meant that the magistrate had failed to make credibility findings with respect to any other aspect of the robbery and theft charges, thus opening the door for the circuit court to make its own findings and reach a different conclusion on those charges. As explained above, the magistrate credited T.N.’s testimony with respect to those charges. Whether S.B. and K.R. had contact with the truck was a necessary element of only one of the theft counts (Count 5), and even that count still required that the State prove that they intended to steal property

from the truck—an allegation which, as discussed above, the magistrate rejected on the basis of T.N.’s testimony. Moreover, the magistrate’s inability to resolve the discrepancy between T.N.’s and McDaniel’s testimony on this discrete issue was in itself a credibility determination: The magistrate found that McDaniel was *not* more credible than T.N. on that point. *See* App. 13 (“I found [T.N.]’s testimony to be more persuasive.”). The circuit court’s express crediting of McDaniel’s testimony over T.N.’s testimony was therefore a rejection of the magistrate’s credibility finding on this point too.

2. Assault Charge

The circuit court likewise rejected other credibility determinations that the magistrate made with respect to the assault charge specifically. The magistrate stated that he “believed [T.N.’s] testimony that neither [S.B.] nor [K.R.] struck or touched Mr. McDaniel.” App. 12. The circuit court, by contrast, found “beyond a reasonable doubt that [K.R.] and [S.B.] did use force and or threat of force to attempt to rob and to conspire to rob” McDaniel, making clear that “[t]he force or threat of force is attributed to the three against one scenario, and [T.N.] hitting and pinning Mr. McDaniel to the truck.” App. 19. That finding was a flat rejection of the magistrate’s decision to credit T.N.’s testimony. The circuit court’s entry of a “facts sustained” judgment on the assault count was necessarily a rejection of the magistrate’s finding, based on T.N.’s testimony, that neither S.B. nor K.R. touched McDaniel and that they did not act in concert with T.N. when he assaulted McDaniel. App. 12-14; *see Amlong*

cf. Amlong, P.A. v. Denny's, Inc., 500 F.3d 1230, 1249 (11th Cir. 2007) (where a district court and magistrate judge's factual interpretations were "impossible to reconcile," the district court's "analysis necessarily and expressly rejected the magistrate judge's credibility findings").

* * *

Accordingly, because the circuit court rejected the magistrate's outcome-determinative credibility determinations without having seen the live witness testimony, S.B. was not given the benefit of a sufficiently reliable factfinding process in violation of his due process rights. In the alternative, as explained in S.B.'s opening brief (27-31), the circuit court's rejection of the magistrate's credibility findings, which were "prima facie correct" and not clearly erroneous, was an abuse of discretion. *Bar Ass'n v. Marshall*, 269 Md. 510, 516 (1973).

Either way, as S.B. established in his opening brief (at 26, 30-31), the appropriate remedy is reversal of the circuit court's order and a remand with instructions to adopt the magistrate's recommendation that S.B. be found "facts not sustained" on all counts. Once T.N.'s account of the incident is properly credited over McDaniel's, no court could find beyond a reasonable doubt that S.B. participated in the assault or attempted to rob McDaniel, and there is thus nothing left for the circuit court to determine on remand.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the circuit court and remand with instructions to adopt the magistrate's recommendation.

Respectfully submitted,

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May 13, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font, spacing, and type-size requirements of Maryland Rule 8-112. I further certify that this brief contains 3,365 words, excluding the portions of the brief excluded from the word count by Rule 8-503.

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