

Circuit Court for St. Mary's County
Case No. C-18-CR-21-000243

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1392

September Term, 2023

AUSTIN DYLAN WINBUSH

v.

STATE OF MARYLAND

Graeff,
Berger,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: October 30, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms with Rule 1-104(a)(2)(B). Md. Rule 1-104.

Following a jury trial in the Circuit Court for St. Mary's County, Austin Winbush was convicted of first-degree attempted murder and use of a firearm during a crime of violence. He was sentenced to life imprisonment with all but twenty-five years suspended. Winbush appeals his conviction and challenges the trial court's ruling that testimony by defense witness Clay Barrett was inadmissible hearsay. On appeal, Winbush presents one question for our review, which we rephrase slightly as follows:¹

If preserved, whether the trial court erred by not admitting the testimony of defense witness Clay Barrett.

For the reasons explained herein, we shall affirm.

FACTS AND PROCEDURAL HISTORY

Winbush was arrested in St. Mary's County for the shooting of James Ford, which occurred on May 5, 2021. The shooting occurred during a gathering at the corner of Missouri Avenue and Flower Drive in Lexington Park, Maryland. The gathering was arranged by Valencia Johnson and Kentasia Wills who planned to meet at the location to fight one another. Ford accompanied Valencia Johnson to the site of the fight, and Rico Baker accompanied Wills. According to witnesses, there were at least fifty people present

¹ Winbush phrased his original question presented as follows:

Whether the trial court committed error when it ruled that the Defense's private investigator (Mr. Clay Barrett) could not testify about statements Mr. Daitoine Payne made to him at a pretrial meeting during the investigation -- statements that were highly relevant and tended to exculpate Winbush.

for the fight. While there, Ford and Baker got into their own altercation. Valencia Johnson told police that, as Ford walked away from Baker, several other individuals jumped on top of him and began attacking him. She then heard gunshots and saw someone shoot Ford and flee down the road. Another witness, Chavonte Johnson, told the police that she saw two shooters. She later identified Winbush as the second shooter.

At trial, defense counsel sought to call Daitoine Payne to the stand to introduce evidence that Winbush was not the shooter. Payne, who was being held in the St. Mary's County jail awaiting sentencing for an unrelated crime, had allegedly spoken with Clay Barrett, a private investigator defense counsel hired during trial preparation. According to defense counsel, Payne told Barrett that he had been present at the scene of the shooting and that Winbush was not one of the shooters. Defense counsel planned to elicit this testimony from Payne during the trial.

When Payne was called to testify, his attorney was present to represent his interests as a witness in this case. Payne's attorney objected to defense counsel's question about the night of May 5, 2021, saying, "I want to make sure that Mr. Payne understands that this is going to be a question that could incriminate him." Ultimately, Payne's attorney invoked Payne's Fifth Amendment right against self-incrimination, and a discussion ensued as to the legitimacy of this claim. Defense counsel argued that such an invocation was not appropriate because "there doesn't seem to be any danger whatsoever to Mr. Payne admitting to his presence at the scene . . . there was no indication whatsoever of any wrongdoing by Mr. Payne." Payne's attorney countered that the issue of Payne's testimony

was “not trifling,” but a “very serious issue.” Payne confirmed that he did not wish to testify, and the court allowed Payne to invoke his Fifth Amendment right. The court then dismissed him.

Following Payne’s departure, defense counsel sought a preliminary ruling as to whether she could call Barrett to testify to what Payne told him regarding Winbush’s presence the night of the shooting:

I think I mentioned in chambers yesterday that if . . . the Fifth were invoked, that we would attempt to call Mr. Barrett with respect to what had been conveyed to him, understanding that it’s hearsay, . . . we also know that the Court recognizes . . . the probative nature of the testimony that we seek, and that the Court can in its . . . discretion admit hearsay if it’s done under reliable circumstances . . .

Defense counsel went on to say that, although no counsel was present during Barrett’s discussion with Payne, that Barrett “is an experienced investigator . . . was a police officer . . . and is quite familiar with the process.” In response, the court asked defense counsel what hearsay exception would apply to that evidence. Counsel replied that she sought to introduce it per “the general, residual power of the Court to admit testimony in particular circumstances where trustworthiness is indicated, and where there’s a need.”

The State maintained that no hearsay exception applied. In making that argument, the State mentioned that the closest potential exception would be Md. Rule 5-804(b)(3), the statement against interest exception, but that under the present circumstances that exception was not applicable. Defense counsel did not argue this point or suggest in any way that the statement against interest exception was being raised as a means of introducing

Barrett’s testimony. Rather, defense counsel further emphasized “the extreme probative nature and the value . . . to Mr. Winbush of having a witness that would testify that he was present at the scene of the shooting and that Mr. Winbush wasn’t involved.” Following this exchange, the court ruled that Barrett’s testimony recounting Payne’s statements was hearsay, and because no exception applied, Barrett’s testimony was inadmissible.

DISCUSSION

On appeal, Winbush argues that the trial court wrongly excluded Barrett’s testimony because it was hearsay evidence admissible under the statement against interest exception embodied in Md. Rule 5-804(b)(3). The State responds, as a preliminary matter, that this argument is unpreserved for review on appeal. The State contends that defense counsel did not argue for admission on these grounds at trial, but instead relied on the “residual exception” to the hearsay rule as grounds for admissibility. Ordinarily, we will not decide an “issue unless it plainly appears by the record to have been raised in or decided by the trial court.” Md. Rule 8-131(a). In addition, “[i]t is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal.” *Klaunberg v. State*, 355 Md. 528, 541 (1999) (citations omitted); *see also Robinson v. State*, 209 Md. App. 174, 202 (2012) (“Because [appellant’s] arguments were not raised below, they are not preserved for appellate review”).

Here, defense counsel asserted a specific ground on which Barrett’s hearsay testimony should be admissible at trial. Citing the “residual power of the Court to admit

testimony in particular circumstances,” defense counsel was referring to Md. Rule 5-803(b)(24), often known as the “residual hearsay exception.” This rule provides:

Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interest of justice will best be served by admission of the statement into evidence . . .

Md. Rule 5-803(b)(24). In arguing for admissibility, defense counsel addressed several factors in Rule 5-803(b)(24), including Barrett’s reliability as a former police officer and experienced investigator, the probative nature of the evidence he would produce, and the court’s discretion in admitting that evidence. Later, when the State raised and dismissed the possibility of the statement against interest exception applying, defense counsel declined to engage in any discussion or argument regarding the applicability of that or any other ground of admissibility beyond the residual exception. Following the court’s ruling not to admit Barrett’s testimony, nothing further was raised on the matter.

Under these circumstances, we hold that Winbush’s claim is unpreserved for appeal. We, therefore, decline to reach the merits of the case. For this reason, we affirm the judgment of the circuit court.

**JUDGMENT OF THE CIRCUIT COURT
FOR ST. MARY’S COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**