

Circuit Court for Wicomico County
Case No. C-22-CR-20-000288

UNREPORTED*
IN THE APPELLATE COURT
OF MARYLAND

No. 1915

September Term, 2022

TORREY MARKIE BRITTINGHAM

v.

STATE OF MARYLAND

Arthur,
Leahy,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: August 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 to MD. R. 1-104(a)(2)(B).

Appellant Torrey Brittingham alleges two errors in his criminal trial: *first*, that evidence of his association with guns should not have been admitted because it reflected a prior bad act; and *second*, that his defense counsel’s failure to obtain a transcript of his first trial constituted ineffective assistance of counsel. We reject Brittingham’s first claim because the admission of the evidence was not error. We decline to rule on Brittingham’s second claim because he has not yet developed the factual record necessary to consider it. It should be raised, if at all, in a separate, collateral post-conviction proceeding. As a result, we affirm the judgment of the circuit court.

FACTS

The facts of this case are messy, confusing, and ultimately, tragic. To resolve the issues presented in this appeal, however, we need only present the basic outline of events. On an evening in April 2020, Brittingham was selling drugs at the Merrifield Apartment complex in Salisbury, when he was “jumped,” beaten, and robbed of his money, cell phone, and other effects. Upset by these events, Brittingham went to an apartment in the complex, gathered a group of his friends, and went back out looking for the men who had robbed him. They found two brothers, Dondre and Adrian Wilson. Brittingham and his friends (the testimony isn’t clear who) shot at the Wilson brothers, killing Dondre. Adrian ran off and summoned police. It was later revealed that the actual robbers were not Dondre and Adrian Wilson, but were, in fact, two other men, Esco Parker and Isaiah Roberts.

Brittingham was charged with a variety of crimes arising out of these events, including murder, attempted murder, assault, reckless endangerment, and use of a firearm in the commission of a crime of violence. His first jury trial ended in a mistrial. At his

second trial, the jury convicted Brittingham of several crimes. The judge, however, sentenced Brittingham only for the first-degree assault of Dondre Wilson and the first-degree assault of Adrian Wilson.¹ This timely appeal followed.

ANALYSIS

Although Brittingham couches it as a single claim, the State sensibly reframed Brittingham's argument as two separate claims. We adopt the State's reframing. *First*, Brittingham argues that evidence of his association with guns was inadmissible as a prior bad act.² *Second*, he argues that his defense counsel failed to obtain transcripts of his first trial (which ended in a mistrial), which amounted to ineffective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution as interpreted by *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. We turn to each of these claims in order.

Brittingham forthrightly acknowledges that his defense counsel failed to object to the introduction of evidence of his association with guns. Ordinarily failure to object to the introduction of inadmissible evidence constitutes a waiver of the claim. *See* MD. R. 4-

¹ Brittingham was acquitted of the murder and attempted murder charges. Other charges resulted in a mistrial. It is not clear to this Court whether the State's Attorney intends to retry the counts that resulted in a mistrial.

² Although Brittingham does not identify the Rule that forms the basis of his complaint, it is Maryland Rule 5-608(b), which provides:

The court may permit any witness to be examined regarding the witness's own prior conduct that did not result in a conviction but that the court finds probative of a character trait of untruthfulness. Upon objection, however, the court may permit the inquiry only if the questioner, outside the hearing of the jury, establishes a reasonable factual basis for asserting that the conduct of the witness occurred. The conduct may not be proved by extrinsic evidence.

MD. R. 5-608(b).

323(A) (stating that “[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for the objection become apparent. Otherwise, the objection is waived...).” Despite this, an appellate court can consider an unobjected-to error under the plain error doctrine. *See, e.g., Yates v. State*, 202 Md. App. 700, 720-22 (2011) (holding that an appellant’s failure to object to jury instructions did not preclude the appellate court from deciding whether to conduct plain error review in his case, although plain error review is rarely exercised). We hold, however, that there was no error in admitting evidence regarding Brittingham’s association with guns. The trial court correctly determined that such evidence was relevant to the likelihood that Brittingham was one of the shooters, which was a contested issue at trial. Moreover, the possession or ownership of guns is not, by itself, illegal and thus does not constitute a prior bad act. *Klauenberg v. State*, 355 Md. 528, 551 (1999). As a result, we hold that Brittingham’s claim is not cognizable on plain error review. Moreover, although we don’t usually address ineffective assistance of counsel claims on direct review, *Mosley v. State*, 378 Md. 548, 562-63 (2003), (as we won’t with respect to Brittingham’s second claim), we hold here, that Brittingham’s counsel’s decision not to object to the evidence of his association with guns was correct and therefore, not ineffective.

Brittingham’s second claim is that his defense counsel provided ineffective assistance of counsel by failing to obtain a transcript of Brittingham’s first trial so that he could, more effectively, exploit inconsistencies in witnesses’ testimony, primarily the testimony of Adrian Wilson. As we noted above, claims of ineffective assistance of counsel are rarely considered on direct appeal. Rather, we generally instruct the defendant to file a

separate, collateral petition under the Uniform Postconviction Procedure Act. MD. CRIM. PROC. CODE ANN., §7-101 *et seq.* In that context, Brittingham can have a hearing at which he can produce evidence regarding whether his counsel failed to obtain a transcript of the first trial, whether there was a strategic reason for deciding not to obtain the transcript, and whether not having a transcript resulted in prejudice to Brittingham's case. Considering these claims in this Court without a factual record is impossible.

**JUDGMENT OF THE CIRCUIT COURT
FOR WICOMICO COUNTY IS
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**