

Circuit Court for Baltimore City
Case No. 115203003

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 600

September Term, 2017

MARCUS WITHERSPOON

v.

STATE OF MARYLAND

Woodward, C.J.,
Beachley,
Moylan, Charles E.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: March 9, 2018

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

A jury sitting in the Circuit Court for Baltimore City convicted Marcus Witherspoon, appellant, of second-degree assault.¹ On appeal, Witherspoon contends that the circuit court erred in admitting “other crimes” evidence. We conclude that the claim of error was not preserved for our review, but in any event, lacks merit, and affirm the judgment of the circuit court.

Austin Heggins testified that on May 15, 2015, Witherspoon, whom he did not know, approached him on the street and asked him for \$40. Heggins told Witherspoon that he did not have any money. Witherspoon said he would pay Heggins back, but Heggins did not believe him and “refused once more.” Witherspoon said, “[a]ny real man would give me the money.” Heggins said “[f]uck off,” “flipped [Witherspoon] off,” and continued walking.

Heggins encountered Witherspoon again on the following day. As Heggins walked to his job at a diner, Witherspoon started walking alongside of him and “demanded” money. Witherspoon told Heggins that “it took everything in him not to kill” Heggins the day before. Witherspoon “lifted up the back of his shirt and revealed a gun.”² Witherspoon pulled out the gun and “flashed it back and forth,” and said “[i]t’s a nice piece, isn’t it,” before putting it back. Witherspoon said: “We’re going to walk to an ATM, since you don’t have any cash, and you’re going to give me money.”

¹ The jury acquitted Witherspoon of the following charges: (1) attempted robbery with a dangerous weapon, (2) attempted robbery, (3) first-degree assault, (4) use of a handgun in the commission of a felony, (5) carrying a concealed weapon, and (6) attempted theft less than \$100.

² Heggins did not know whether the gun was real or “fake.”

The evidentiary ruling at issue in this case was made during redirect examination. Heggins stated that, while Witherspoon was displaying his gun, he claimed that he had “pulled the trigger already that day on two people,” and that he had been incarcerated seven times. Defense counsel objected to the testimony on grounds that it was “outside the scope of cross [examination],” “unfairly prejudicial, and irrelevant.” The trial court ruled that Witherspoon’s statement was admissible as a statement of a party opponent.

Heggins felt “threatened” and “went into survival mode.” He noted Witherspoon’s physical description and walked toward an ATM near the diner because he knew that there were security cameras outside the diner. Heggins asked Witherspoon if he could “clock in” first, so that he would not be late for work, and told Witherspoon that he would then go with him to the ATM across the street. Witherspoon agreed and waited outside, while Heggins went into the diner, clocked in, then called the police.

When Heggins did not reemerge, Witherspoon entered the diner and looked around, presumably for Heggins, then eventually left. Heggins was later shown a photo array, and wrote on Witherspoon’s photo: “This is, without a doubt, the man that held (or attempted) me up with a gun. He told me that he would kill me if I didn’t withdraw any money from an ATM.”

On appeal, Witherspoon contends that the trial court improperly overruled his objection to the testimony that he said he “pulled the trigger” on two people that day and

had served time in jail on several occasions, claiming that the testimony was inadmissible evidence of “other crimes,” pursuant to Md. Rule 5-404(b).³

Because Witherspoon did not argue this theory at trial, but stated different grounds for the objection, his argument on appeal is not preserved for our review. *See Ware v. State*, 360 Md. 650, 675 (2000) (where appellant never argued below that testimony was inadmissible under Md. Rule 5-404(b), issue not preserved for appellate review), *cert. denied*, 531 U.S. 1115 (2001); *Jeffries v. State*, 113 Md. App. 322, 341 (holding that a party who objected to testimony at trial only as to general relevance could not argue for the first time on appeal that the testimony was inadmissible evidence of other bad acts), *cert. denied*, 345 Md. 457 (1997).

In any event, Witherspoon’s statement was not subject to Rule 5-404(b). As the Court of Appeals has noted, prior bad acts evidence is admissible where it is “so much a part of a setting of the case and its environment that [their] proof is appropriate in order to complete the story of the crime on trial by proving the immediate context of the *res gestae*.” *Merzbacher v. State*, 346 Md. 391, 410 (1997) (quoting *U.S. v. Powers*, 59 F.3d 1460, 1466 (4th Cir. 1995) (internal citations and quotation marks omitted)). *See also Odum v. State*, 412 Md. 593, 611 (2010) (“[a]cts that are part of the alleged crime itself (such as acts in

³ Md. Rule 5-404(b) provides:

“[e]vidence of other crimes, wrongs, or acts including delinquent acts as defined by Code, Courts Article, § 3-8A-01 is not admissible to prove the character of a person in order to show action in conformity therewith. Such evidence, however, may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.”

furtherance of an alleged conspiracy), or put in its immediate context, are not “other acts” and thus do not have to comply with Md. Rule 5-404(b).”) (quoting LYNN McLAIN, MARYLAND EVIDENCE STATE AND FEDERAL § 404.5 (2009 Supp.)). That Witherspoon claimed, as he revealed a gun and demanded money from Heggins, that he had been incarcerated on numerous occasions and had already “pulled the trigger” on two people that day, was part of the charged crimes of assault and attempted armed robbery.⁴ Witherspoon arguably made the statement in furtherance of those crimes, and the statement was admissible to “complete the story of the crime[s] on trial.”

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**

⁴ As the jury was instructed, assault is intentionally frightening another person with the threat of immediate offensive physical contact or physical harm. Maryland Criminal Pattern Jury Instructions (MPJI-Cr) 4:01. Robbery is the taking and carrying away of property from someone’s presence and control by force or threat of force, with the intent to deprive the victim of the property. MPJI-Cr 4:28.