Circuit Court for Wicomico County
Case No.: C-22-CR-21-000004

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1707

September Term, 2021

J'WAUN AH'KEEM PETERS

v.

STATE OF MARYLAND

Kehoe,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),
JJ.

PER CURIAM

Filed: September 1, 2022

*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.

Following trial in the Circuit Court for Wicomico County, a jury found J'Waun Ah'Keem Peters, appellant, guilty of first-degree assault, second-degree assault, conspiracy to commit first-degree assault, use of a firearm in the commission of a crime of violence, and several other firearms-related offenses.[1] Thereafter, the court sentenced him to 15 years' imprisonment for first-degree assault plus 5 consecutive years' imprisonment for using a firearm in the commission of a crime of violence.[2]

Appellant noted an appeal. In it, he claims that the trial court erred in admitting the hearsay testimony of a co-conspirator into evidence under the exception for such testimony found in Maryland Rule 5-803(a)(5).[3] We disagree and shall affirm.

BACKGROUND

The evidence adduced at trial showed that, on December 6, 2020, Marlon Henson, the victim, was shot in the neck as he sat in his parked car in the parking lot of the Pemberton Manor Apartments in Salisbury, Maryland. Even though the victim survived the attack, he never identified his assailants.

[1] The trial court granted a defense motion for judgment of acquittal on counts charging attempted first-degree murder, conspiracy to commit first-degree murder, and attempted second-degree murder.

[2] The court also imposed 5 concurrent years imprisonment for unlawful possession of a regulated firearm and merged the remaining convictions for sentencing.

[3] Maryland Rule 5-803(a)(5) provides that "[a] statement that is offered against a party and is … [a] statement by a coconspirator of the party during the course and in furtherance of the conspiracy" is "not excluded by the hearsay rule, even though the declarant is available as a witness[.]" The "hearsay rule," which is found in Maryland Rule 5-802, provides that hearsay is not admissible, except as otherwise specifically allowed by an applicable rule, constitutional provision, or statute.

Three days after the shooting, the police stopped a car that appellant was then driving. In that car were passengers Emma Hinkley and Trevion Townsend. Hinkley testified that, as the car was being pulled over, appellant handed her a pistol and she put it in her purse. During a search of the car, the police recovered a 9mm semi-automatic handgun from her purse. Expert testimony admitted into evidence at trial showed that the projectile recovered from the shooting victim had been fired from the gun found in Hinkley's purse.

At trial, Hinkley testified that, on the day of the shooting, she had been riding in appellant's car with appellant and Townsend.[4] She had known both men for only a few weeks and had become romantically involved with appellant. As the three were sitting in the car outside Townsend's home, appellant announced that a person named Marlon Henson (the victim in this case) had posted on the social media app Snapchat "in regards to ['']people who don't like me[,] where are you at.['']" Hinkley said that appellant showed the posting to Townsend who "got a little upset about it as far as, like, anger."

During the direct examination of Hinkley, after the State asked her if Townsend had said anything with respect to the victim's post on Snapchat, the defense objected and the trial court held a bench conference to discuss the admissibility of Townsend's out-of-court statement. At the conclusion of the bench conference, the court concluded that Townsend's

[4] Hinkley explained that she testified for the State under an agreement which substantially limited her criminal exposure for the shooting of the victim, the possession of the firearm, and the possession of cocaine that the police had recovered as part of the earlier stop of appellant's car.

statement was admissible under the statement of a co-conspirator hearsay exception. The following then transpired:

> Q. Ms. Hinkley, to back up a second, so [appellant] you said mentioned, for everyone to hear, including Trevion [Townsend], about [the victim]'s [Snapchat] post?
>
> A. Yes.
>
> Q. Right? Did [Townsend] then say anything about what he and [appellant] should do next?
>
> A. [Townsend] had just explained, went on explaining that he had just wanted to beat [the victim] up.
>
> ****
>
> Q. So when [Townsend] made that statement, did [appellant] exhibit any reaction?
>
> A. Yes.
>
> Q. What was [appellant's] reaction?
>
> A. As far as, I wanna say egging and/or hyping him up, meaning condoning exactly what he was saying, condoning exactly what [Townsend] was saying as far as beating [the victim] up.
>
> Q. And did [appellant] condone that, using your word, or egging Mr. Townsend on, using your phrase, in words?
>
> A. Yeah, … [appellant] was saying that he should do that.
>
> Q. Okay. So what happened after that bit of conversation? What happened, what did you guys do?
>
> A. We were still sitting, all three of us, including me, [appellant] and [Townsend], we were all sitting in the car. And [appellant] went to look at [the victim]'s location on Snap Chat.

Hinkley testified that, in response to appellant showing the victim's location to Townsend, Townsend "[j]ust went on about him fighting him again." Appellant then sent

a text message to the victim asking him where he was. The victim responded that he was in "Jonestown." Hinkley, appellant, and Townsend then drove to the Pemberton Manor Apartments, stayed there for 20 or 30 minutes, left to smoke marijuana and get something to eat, went to Townsend's house, parked in the driveway, and sat in the car. While parked in Townsend's driveway, appellant suggested that the group return to the Pemberton Manor Apartments to wait for the victim, which they did.

Upon re-arrival at the victim's apartment complex, appellant and Townsend continued their discussion about beating up the victim. Hinkley said that the victim arrived "no sooner after we had arrived there[.]" Shortly thereafter, after appellant and Townsend again talked about Townsend fighting the victim, appellant handed Townsend a gun. Townsend then "[r]an up to [the victim]'s car." Hinkley testified that she "heard a knock, which could've been his hand or it could've been the gun on the window … [a]nd then a little bickering back and forth[.] She "heard yelling but it wasn't clear enough for [her] to make out what was being said." And then she saw and heard the "the loud flash and the sound of the gun" while Townsend stood right in front of the driver's door of the victim's car. Townsend then ran back to appellant's car, yelled "I shot him in the face," and handed the gun back to appellant who wiped it with his shirt before placing it in the center console of his car. Appellant then drove them away.

The group then spent the night at a relative of appellant's home during which time the group discussed whether Townsend had killed the victim. The next morning, appellant drove Hinkley home.

DISCUSSION

As noted above, appellant contends that the trial court erred in admitting the testimony of Hinkley that she heard Townsend say that he wanted to beat up the victim. According to appellant that testimony constituted inadmissible hearsay and did not fall under the so-called co-conspirator exception to hearsay rule because the statements were made to other co-conspirators, *i.e.*, Hinkley and appellant, and not made to a "third party." In addition, appellant argues: "the assertions made by Townsend may not be considered the admissions of [a]ppellant. Townsend's expression of his desire and intention to attack [the victim] was not a sentiment adopted by [a]ppellant that he put out in the world as his own—it was Townsend's alone, expressed by him within the group only."

We review *de novo* "whether evidence is hearsay and, if so, whether it falls within an exception and is therefore admissible[.]" *Hallowell v. State*, 235 Md. App. 484, 522 (2018). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). Absent an exception "provided by [the Maryland rules] or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802.

As noted earlier, one such exception to the hearsay rule is found in Maryland Rule 5–803(a)(5), which permits the introduction of a statement by a co-conspirator of a party, even if the statement is hearsay, so long as the co-conspirator made the statement "during the course and in furtherance of the conspiracy." "The general rule is that such statements are admissible only after a *prima facie* showing that the conspiracy exists and the declarant

and his co-conspirators are participants in it." *Ezenwa v. State*, 82 Md. App. 489, 512 (1990) (citation omitted). "The Court of Appeals has made clear that 'it is not necessary that a conspiracy be conclusively established before the declarations are admissible. Flexibility in the order of proof is allowed.'" *Id*. at 513 (quoting *Grandison v. State*, 305 Md. 685, 733 (1986).

In our view, appellant's argument attempts to add a requirement to the co-conspirator exception not found in Maryland law. Maryland law simply does not contain any requirement that the hearsay statement of a co-conspirator be made to, or in the presence of, a third-party as a prerequisite to its admissibility. In addition, the evidence adduced at trial, including the evidence that appellant encouraged Townsend to assault the victim, participated in the search for him, and provided Townsend with the gun he used to shoot him, belies any notion that Townsend's statement announced his own intentions, and not the intentions of the group.

We are persuaded that the evidence adduced at trial firmly established a conspiracy between appellant and Townsend (and likely Hinkley) to harm the victim. We are similarly persuaded that Townsend's statements to the effect that he wanted to harm the victim were made during, and in furtherance of, that conspiratorial plot. As a result, we find no error in the admission into evidence of Townsend's statements through Hinkley under the co-conspirator exception to the hearsay rule.

Consequently, we affirm the judgments of the circuit court.

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