Circuit Court for Wicomico County
Case No. 22–K–15–000501

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 750

September Term, 2016

JARRETT VAUGHN STOKES

v.

STATE OF MARYLAND

Kehoe,
Nazarian,
Leahy,

JJ.

Opinion by Kehoe, J.

Filed: August 2, 2017

*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. *See* Md. Rule 1-104.

After a jury trial in the Circuit Court for Wicomico County, Jarrett Vaughn Stokes was convicted of the first-degree murder of Rakim Russell, as well as a number of related offenses.[1] In his appeal from that judgment, he presents the following issues, some of which we have reworded slightly:

> 1. Did the trial court err in allowing a police officer to testify about out-of-court statements by accomplices that inculpated Stokes?
>
> 2. Did the trial court err in permitting the State to enter into evidence Twitter conversations between Stokes and other persons?
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> 3. Did the trial court err in permitting the State to enter into evidence a photograph of Stokes with another person who was holding a handgun?
>
> 4. Did the trial court err in failing to merge several convictions and sentences?
>
> 5. Did the prosecutor mislead the jury as to the nature of a co-defendant's plea bargain thereby denying Stokes a fair trial?

For the reasons discussed below, the first issue is dispositive. An inculpatory hearsay statement made by an alleged accomplice was offered at trial for the truth of the matters asserted in it and was made under circumstances that rendered it "testimonial," as that concept has been defined in *Crawford v. Washington,* 541 U.S. 36, 51–53 (2004), and related cases. Because the declarant was not available for cross-examination by Stokes at his trial, admission of the statement violated Stokes's right to confront the witnesses

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[1] Stokes was also convicted of second-degree murder, two counts of conspiracy to commit first-degree murder, first-degree assault, two counts of conspiracy to commit first-degree assault, second-degree assault, two counts of reckless endangerment, possessing a concealed weapon, transporting a handgun in a vehicle, wearing and carrying a handgun on one's person, use of a handgun in the commission of a crime of violence and possession of a handgun by one under the age of twenty-one.

against him, a fundamental right guaranteed to all defendants in criminal trials by the Sixth Amendment to the United States Constitution. Because we cannot conclude beyond a reasonable doubt that the trial error had no effect on the jury's verdict, we will reverse the convictions.

Background

Stokes does not assert that the evidence presented at trial was legally insufficient to support his convictions, so we will provide a very abbreviated summary of the evidence presented to the jury to give context to the parties' appellate contentions.

On August 2, 2015, Larry Ennis, Ky-Shir Connally, and Marquel Pinder attended an "Under 21" party at the America's Best Value Inn in Salisbury, Maryland. The trio lived in or near Delmar, a small town a few miles from the hotel. While at the party, Ennis and Connally became involved in a verbal altercation with Kevin Land, who apparently lived in Salisbury, and about 20 of his friends. Outnumbered, Ennis and Connally left the party. Pinder, who was driving a white Chevrolet Impala, drove them to back to Delmar. Humiliated and seeking retribution, Ennis and Connally sought the assistance of Stokes.

At about 11:30 p.m., Pinder, together with Ennis, Connally, and Stokes, who was armed with a handgun, returned to Salisbury and pulled up next to the hotel's parking lot. By that time, the hotel's security guards had shut the party down, and about 200 people were milling about in the parking lot. After unsuccessfully scanning the crowd for a few minutes in search of Land, Stokes fired several times into the crowd at random. One of

the bullets struck 17-year-old Rakim Russell in the forehead, inflicting fatal injuries. Stokes and his companions fled the scene in the white Impala.

On the next day, and at their own instigation, Stokes, Connally, and Ennis went together to the Salisbury Police Department with the intention of establishing false alibis, specifically, that they were at a party in Delmar when the shooting occurred. They were interviewed separately, and the stories that each related were inconsistent in some details. That afternoon, Pinder also went to the police station and gave a similar statement. Pinder then sought the assistance of a lawyer. Through the lawyer, Pinder entered into a plea agreement with the State and agreed to plead guilty to reduced charges in return for testifying truthfully against the other co-participants in the murder.

The police arrested all four individuals. After his arrest, Connally was interviewed by Detective Ryan Brittingham of the Salisbury Police Department. Connally admitted to being in the car when the shots were fired. He also identified Stokes as the shooter and Pinder as the driver.

Prior to Stokes's trial, Ennis and Connally, through counsel, indicated that they would assert their Fifth Amendment rights not to testify. At trial, in addition to other evidence linking Stokes to the murder, the State instead presented two police officers who testified, over defense counsel's objections, as to statements made to them by Stokes's alleged accomplices during the pre- and post-arrest interviews. Because the State raises preservation arguments on appeal, we set out, below, an extended portion of the transcript covering the challenged testimony.

The first objection at issue was raised during the prosecution's examination of Detective Brittingham, after the prosecution asked about the content of the false alibis provided to police by Ennis and Connally:

Defense Counsel:	Judge, I would object to, at this point to testimonial evidence being offered. And obviously I don't have a chance to cross-examine the witness. I would note that for the record. If Your Honor feels it's appropriate to admit this evidence, I would just ask that the State's Attorney, instead of getting Detective Brittingham's interpretation of the interview, that they simply play the interview in its entirety so the jury can hear.
The Court:	Well, that's [the prosecutor's] decision. Your objection is overruled.

Detective Brittingham then shared with the jury Ennis's and Connally's inconsistent accounts of their whereabouts the night of the shooting.[2]

The same objection was raised moments later when the prosecution's examination of Detective Brittingham turned to a second interview with Connally, that occurred after Connally had been arrested:

Prosecutor:	[D]id there come a point in time when you had a second interview with Ky'Shir Connally?
Witness:	That's correct, I interviewed him a second time after he had been arrested.
Defense Counsel:	Judge, I would, — well, I'll let [the prosecutor] ask the question.

[2] We do not detail the content of these statements because, as discussed below, appellant's counsel conceded at oral argument—and we agree—that these statements were not testimonial.

Prosecutor:	What date did you interview Mr. Connally?
Witness:	It would have been the 4th of August.
Prosecutor:	Where did you interview him?
Witness:	He was interviewed at the Salisbury police headquarters.
Prosecutor:	And that was recorded?
Witness:	Yes, it was.

. . . .

Defense Counsel:	**Judge, I would object that this point, this is testimonial hearsay. Can we approach?**
The Court:	You don't have to approach. Do you wish to respond?
Prosecutor:	**No. I think it's relevant.**
The Court:	Huh?
Prosecutor:	I think it's relevant.
Defense Counsel:	They have been arrested.
The Court:	**I agree. It's probative and relevant; your objection is overruled.**
Defense Counsel:	Judge, can I make a proffer for the record, please?
	(Whereupon, counsel approached the bench and the following occurred at the bench:)

Defense Counsel:	So at this point the state is admitting a co-defendant's post arrest confession and that would fall into testimonial hearsay. I have no opportunity to cross-examine Ky'Shir Connally on this interview. This is not anything in furtherance of a conspiracy whatsoever, they've been arrested, the crime is over. This is not admissible. **This is clearly inadmissible testimonial hearsay and there's a confrontation clause violation if this comes in.**
The Court:	What do you say to that?
Prosecutor:	It's clearly in furtherance of the conspiracy,[3] which is the hearsay exception, because they're discussing about who hid the gun, where they put the gun, who flung the gun. It goes into great detail about the gun. They are clearly all working together after the fact to continue the conspiracy to get even, which was the original conspiracy.
Defense Counsel:	**Judge, they have been arrested, this is reversible error if this comes in.**
Prosecutor:	Additionally during cross-examination of Mr. Pinder [defense counsel] insinuated that it was Mr. Connally and Mr. Ennis who were in the car, Mr. Connally and Mr. Ennis who was the shooter, so I believe that the door has also been open to information that Mr. Connally and Mr. Ennis were not the shooter. And that is the direct question on cross-examination.
The Court:	I know there's a case that if a co-conspirator's statement was made months after the event –

[3] On the previous day of trial, defense counsel objected to testimony regarding the interviews with Ennis and Connally. (T1-193–99). The prosecutor took the position that their statements to Detective Brittingham were part of a false alibi conspiracy. (T1-195).

The court ruled that the State was required to present independent evidence of the conspiracy before it could introduce hearsay statements by co-conspirators. The court was correct. *See, e.g., State v. Baxter,* 92 Md. App. 213, 225 (1992). The State established such evidence through the testimony of Pinder. The State then recalled Detective Brittingham.

Prosecutor: Correct.

The Court: --and not for the purpose of concealing the crime, then it's not admissible.

Prosecutor: Correct. This is less than 48 hours after the crime.

The Court: Any response to that, [defense counsel]?

Defense Counsel: Judge, yeah, **they've been arrested, therefore it's testimonial. If it's testimonial then it's hearsay and it violates the Confrontation Clause.**

Prosecutor: Testimonial doesn't make it hearsay. The hearsay exception –

Defense Counsel: It means the exception does not apply.

The Court: **You have made your objection, I have overruled your objection.**

Prosecutor: I just want to clarify. August 4th you interviewed Mr. Connally?

Witness: That's correct.

Prosecutor: At the Salisbury police Department?

Witness: Yes.

Prosecutor: Did you advise him of his Miranda rights?

Witness: Yes.

Prosecutor: Did he agree to speak with you?

Witness: Yes, he did.

Prosecutor: That second time you interviewed Mr. Connally, how was his statement different from the first time?

Witness:	[H]e advised us initially that he had lied about who was in the vehicle, when he was leaving the party. . . . After further questioning he admitted to meeting up with Mr. Stokes [in Delmar] and he went into details of the incident leading up to the shooting.
Prosecutor:	**Who did Mr. Connally indicate was the shooter?**
Witness:	**Mr. Connally indicated that Jarrett Stokes was the shooter**.
Prosecutor:	Who did Mr. Connally indicate was the driver?
Witness:	He indicated that Marquel Pinder was the driver.

(Emphasis added.)

The prosecution later examined Detective Jeff Miller, the lead investigator in the case. His testimony focused on various text messages and similar communications between Stokes, Pinder, Connally and Ennis both before and after Mr. Russell's murder. On cross-examination, Miller testified that the Impala had not been examined for DNA or fingerprint evidence, even though the vehicle was in police custody and the police had obtained a warrant to search it. On redirect, the following occurred:

Prosecutor:	[Defense Counsel didn't] ask you why you didn't do DNA testing on the car when you had Mr. Stokes's DNA. Why didn't you compare it to the car?
Witness:	DNA was recovered as a precautionary measure in case the firearm was located in this incident, and **I didn't send off for it because I had three co-defendants' statements telling me that Jarrett Stokes was the shooter.**

(Emphasis added.)

Defense counsel did not object to the question or the answer.

After the State finished presenting its witnesses, the defense introduced four witnesses who all testified that Stokes was at the party on Line Road the night of the shooting. The defense's theory of the case was that Stokes was not at the America's Best Value Inn on the night of the shooting. Stokes did not testify. The jury returned a guilty verdict on all counts for Stokes.

Analysis

I. The Confrontation Clause

In his brief, Stokes contends that the trial court violated his right to confront the witnesses against him by admitting Ennis and Connally's alibi statements to the police, as well as Connally's post-arrest statement identifying Stokes as the shooter. For its part, the State asserted that Ennis and Connally's alibi statements were neither testimonial nor were they offered for their truth, but conceded that Connally's second statement, given after his arrest, was testimonial hearsay. However, the State asserts that Stokes's appellate contentions regarding Connally's second statement are not preserved for appellate review.

A.

In the landmark case of *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Sixth Amendment's Confrontation Clause[4] "prohibits the introduction

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[4] The Sixth Amendment states in pertinent part:

of testimonial statements by a nontestifying witness, unless the witness is 'unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Ohio v. Clark*, ___ U.S. ___, 135 S. Ct. 2173, 2176 (2015) (quoting *Crawford,* 541 U.S. at 54). A "testimonial" statement is one "made for the purpose of establishing or proving some fact." *Clark*, 135 S. Ct. at 2179 (2015). Importantly, "the Confrontation Clause applies only to hearsay, or out-of-court statements offered and received to establish the truth of the matter asserted." *Derr v. State,* 434 Md. 88, 106–07 (2013).

In his opinion for the majority in *Clark,* Justice Alito observed that the Supreme Court's decision in *Crawford*:

> did not offer an exhaustive definition of "testimonial" statements. Instead, *Crawford* stated that the label "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations."

135 S. Ct. at 2173 (quoting *Crawford,* 541 U.S. at 68).

In the years after *Crawford* was filed, courts have grappled with the issue of what are, and what are not, testimonial statements for the purposes of the Confrontation Clause. The most important of these decisions for our purposes is *Davis v. Washington*, 547 U.S. 813 (2006), in which the Court considered whether statements to police officers made by victims of crime—in *Davis,* victims of domestic violence—were testimonial.

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

The Court concluded that the Confrontation Clause does not prohibit the introduction of statements to police officers that were made when "the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822. However, statements "are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id.* Maryland courts have consistently recognized this distinction and applied it in appropriate cases. *See, e.g., Norton,* 443 Md. 517, 530–32 (2015); *Cox v. State,* 421 Md. 630, 643–51 (2011); *Langley v. State,* 421 Md. 560, 571–77 (2011); *Morris v. State,* 418 Md. 194, 213 n. 11 (2011); *State v. Lucas,* 407 Md. 307, 313–20 (2009); *Clark v. State*, 188 Md. App. 110, 123–26 (2009).

B.

In his brief, Stokes argues that the trial court violated his right to confront the witnesses against him when it admitted the pre-arrest statements made by Ennis and Connally. At oral argument, however, his counsel conceded that these statements were not testimonial. Although we are not bound by a party's concession as to a legal issue, *see, e.g., Coley v. State*, 215 Md. App. 570, 572 n. 1 (2013), we agree with the position that Stokes took at oral argument. The statements in question were not offered by the prosecutor to prove the matters asserted in them—indeed, it was the prosecutor's position that the statements were false—but rather to show that Ennis, Connally and Stokes were acting in concert with one another. The Confrontation Clause does not bar admission of a

hearsay statement if it is not offered for its truth. *Derr v. State,* 434 Md. 88, 106–07 (2013).

The same cannot be said of Connally's post-arrest statement, shared by Detective Brittingham during the prosecution's examination. This statement was introduced by the prosecution for the truth of one of the matters asserted in it, namely, that Stokes shot Mr. Russell. Connally made the statement to a police officer in the course of a post-arrest interrogation at a police station and after he had received his *Miranda* advisements. The State does not suggest that the statement was made in the context of an on-going emergency. It is clear that "the primary purpose of [Connally's post-arrest] interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822. We conclude that the statement was testimonial and its introduction violated Stokes's right to cross-examine the witnesses against him. The trial court erred when it overruled defense counsel's objection.

C.

The State does not contest this conclusion but instead argues that Stokes is barred from raising his Confrontation Clause argument on appeal because his trial counsel did not make a contemporaneous objection or ask for a continuing objection to testimony about Connally's post-arrest statement. The State also asserts that Stokes waived any objection to the testimony because he failed to object when Detective Miller later testified that he "had three co-defendants' statements telling [him] that Jarrett Stokes was the shooter." We do not agree with either contention.

Md. Rule 8-131 provides that, as a general rule, an appellate court will not decide an issue "unless it plainly appears by the record to have been raised in or decided by the trial court[.]" In the context of evidentiary objections, Md. Rule 4-323 states in pertinent part:

> (a) An objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived. . . .
>
> (b) At the request of a party or on its own initiative, the court may grant a continuing objection to a line of questions by an opposing party. For purposes of review by the trial court or on appeal, the continuing objection is effective only as to questions clearly within its scope.

These rules exist so that "other parties and the trial judge are given an opportunity to consider and respond to the challenge." *Chaney v. State*, 397 Md. 460, 468 (2007). The purpose of these rules is "to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings," as well as "to prevent the trial of cases in a piecemeal fashion." *Blanks v. State*, 406 Md. 526, 538 (2008) (internal citations omitted).

We set out the colloquy between counsel and the trial court earlier in this opinion. By our count, defense counsel objected to the introduction of evidence regarding Connally's post-arrest statement no less than five times. He fully explained the basis for his objections and the consequence that might result if the evidence were admitted. This discussion ended when the trial court stated: "You have made your objection, I have overruled your objection." It is true, as the State points out in its brief, that defense counsel did not lodge an additional objection after Detective Brittingham testified as to the substance of Connally's statement. But Brittingham's response came just moments

after the trial court had uttered what it clearly intended to be the final words on the issue. By that time, defense counsel had done all that he could reasonably be expected to do to bring the Confrontation Clause problem to the trial court's attention. The court, after considering the parties' contentions, overruled Stokes's objection. For us to hold that Stokes waived the issue for appellate review because his lawyer failed to make a sixth objection moments later would be to elevate form over substance. We decline to do so.

The State also argues that Stokes waived appellate review of his Confrontation Clause argument because Detective Miller later testified without objection that he "had three co-defendants' statements telling [him] that Jarrett Stokes was the shooter." We do not agree.

The principle on which the State relies is completely valid. *See, e.g., DeLeon v. State*, 407 Md. 16, 31 (2008) ("Objections are waived if, at another point during the trial, evidence on the same point is admitted without objection."). That principle is not applicable in this case, however. As we recently explained in discussing a very similar argument:

> The State is right that an objection normally is expected each time the excluded evidence would be offered. But that principle is meant to guard against contextual sandbagging, to allow the trial court an opportunity to consider whether the evidence offered and testimony elicited since an earlier ruling supports its decision or compels a change. In this instance, no testimony or evidence could have altered the court's ruling or the context in which the court made it—the decision was final and purely legal, and the objection to that ruling preserved under the circumstances.

Hall v. State, ____ Md. App. ____, No. 1690, Sept. Term, 2015, 2017 WL 2806765, at *4 (June 28, 2017).

We believe that the same analysis applies with equal force in the present case. The trial court based its ruling that testimony about Connally's post-arrest statement was admissible on purely legal grounds. There was no intervening evidence that would have caused the court to revisit its prior ruling. Accordingly, trial counsel's failure to object to Detective Miller's statement did not constitute a waiver of Stokes's right to raise the issue on appeal.

Finally, we are unable to conclude beyond a reasonable doubt that admission of the testimony regarding Connally's post-arrest statement did not affect the jury's verdicts. The principle witness against Stokes was Pinder, whose credibility was vigorously attacked on cross-examination. We cannot say that Connally's corroborating statement did not affect the jury's verdict. *See Dionas v. State,* 436 Md. 97, 118 (2013) (The trial court's ruling "deprived both the petitioner of his right to confront [Connally], and the jury of its function to make a discriminating appraisal of [Connally's] potential bias and [his] credibility[.] We cannot conclude, beyond a reasonable doubt, that there was no possibility of prejudice resulting from the trial court's error.").

Because we are reversing the convictions, it is not necessary for us to consider any of Stokes's other contentions.[5]

THE JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY ARE REVERSED AND THIS CASE IS REMANDED TO IT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE TO BE PAID BY WICOMICO COUNTY.

[5] Prior to oral argument, Stokes filed a motion to supplement the record with a transcript of Pinder's guilty plea proceeding. The State did not oppose the motion. Although our holding moots Stokes's contention that the prosecutor misrepresented the plea agreement to the jury in closing argument, we will grant the motion as a matter of house-keeping to facilitate consideration of the issue in the event that the case is remanded to this Court in the future.