UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1563

September Term, 2015

CHARLES PATTERSON

v.

STATE OF MARYLAND

Graeff,
Friedman,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: February 10, 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. Md. Rule 1-104.

On June 3, 2015, a jury in the Circuit Court for Baltimore County found Charles Patterson, appellant, guilty of attempted murder, retaliation against a witness, and related crimes for his role in a shooting that occurred on March 3, 2014. The circuit court sentenced appellant to life, all but 70 years suspended, for the conviction of attempted murder, 20 years, consecutive, for the conviction of retaliating against a witness, and five years, concurrent, for the conviction of use of a firearm in the commission of a crime of violence. The remainder of appellant's sentences were suspended.

On appeal, appellant presents the following seven questions for this Court's review, which we have rephrased slightly, as follows:

1. Did the circuit court err in admitting testimonial statements made by a co-defendant to police where the co-defendant was not tried with appellant and the defense was not permitted to confront and cross-examine the co-defendant?

2. Did the circuit court fail to exercise its discretion or abuse its discretion in granting the State's motion to extend time for discovery and in denying appellant's motion to compel discovery?

3. Did the circuit court abuse its discretion in denying appellant's motion for recusal?

4. Did the circuit court err or abuse its discretion in admitting irrelevant and unfairly prejudicial evidence?

5. Did the circuit court abuse its discretion in admitting inflammatory and unfairly prejudicial evidence?

6. Did the circuit court abuse its discretion in allowing a lay witness to give expert testimony regarding the cause of [C.F.'s][1] injuries?

[1] Because one of the victims in this case was a child, and because one of the offenses committed in this case was retaliation against a witness, we have abbreviated some names.

7. Should the docket entries be corrected to reflect that no verdict was returned on Count 9?

For the reasons set forth below, we shall reverse the judgments of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

This case involves three brothers: Charles Patterson, appellant, Kenneth Brooks, and Daren Keon Gray. The State's theory of the case was that appellant attempted to shoot Roland Eisenhart, while Mr. Eisenhart was riding in a minivan with three other people, in retaliation for testifying against appellant's brother, Mr. Gray, in a prior case. The State alleged that Kenneth Brooks, appellant's other brother, saw Mr. Eisenhart at Charlie Brown's convenience store, called appellant to let him know, and appellant then shot into the car in which Mr. Eisenhart was riding, injuring a two-year-old child.

At trial, William Bickel, a Baltimore County prosecutor, testified that, in October 2013, he prosecuted a felony robbery case involving appellant's brother, Daren Keon Gray. Mr. Eisenhart testified at both the pretrial motions hearing and at the 2013 robbery trial, and he was considered by Mr. Bickel to be an "essential witness for the State." Due, in part, to Mr. Eisenhart's critical testimony, Mr. Gray was convicted of 19 counts of armed robbery and related handgun offenses and sentenced to 120 years.

Mr. Bickel testified that both he and a detective involved in the 2013 robbery case were "very concerned for Mr. Eisenhart's safety, both pretrial and post trial." "[T]here were a number of family members . . . in the courtroom at the time the sentences were handed down, and there was a very real tension." A lot of people were unhappy. Mr. Bickel called the detective immediately after sentencing, advising him to call

Mr. Eisenhart and tell him "to hang low for a long time, because [Mr. Bickel] had a very bad feeling."

The Shooting

On March 3, 2014, at approximately 10:00 p.m., Mr. Eisenhart walked to Charlie Brown's Convenience Store to meet C.C., a good friend, and C.C.'s mother, A.C. C.C. had a daughter, C.F., who was two years old at the time. Mr. Eisenhart made a purchase and sat down at a table inside the store to wait for A.C. and C.C. to pick him up. Unbeknownst to Mr. Eisenhart, Mr. Brooks had arrived at the convenience store in a red Crown Victoria and followed Mr. Eisenhart inside.

As he was sitting in the convenience store, Mr. Eisenhart noticed Mr. Brooks' red car, which initially was sitting in front of the store.[2] He observed the red car move to another parking space near the end of the parking lot "alongside the store." The driver backed the red car into a parking space and waited.

Mr. Eisenhart waited in the convenience store for approximately 10 to 15 minutes until C.C., A.C., and C.F. arrived in a silver Dodge minivan. Mr. Eisenhart entered the minivan on the rear driver's side and sat behind A.C. who was driving. Seated beside Mr. Eisenhart in the rear passenger's side seat was C.F., who was secured in a child car seat. C.C. was seated in the front passenger's side seat next to A.C.

[2] Mr. Eisenhart described the car as a dark red, possibly burgundy, "Crown Vic, like a Lincoln Town car or something like that."

As the four left the convenience store parking lot, Mr. Eisenhart noticed that, within seconds, the red car also left the parking lot and was following them at a distance of approximately three car lengths. Shortly thereafter, Mr. Eisenhart noticed that the red car had dropped back to approximately 100 yards behind their minivan, and a small dark-colored car turned in front of the red car. A.C. turned left onto Kenwood Avenue, and the red and dark-colored cars followed. The cars followed the minivan for approximately two or three minutes before the red car pulled over.

The dark-colored car continued to follow the minivan up Kenwood Avenue for a short distance. When the minivan stopped at a red light, the dark-colored car pulled alongside the minivan, and someone fired several shots from the car into the minivan, shattering the minivan's rear passenger's side window. The dark-colored car "pull[ed] off" and drove away. A.C. drove the minivan for a short distance before pulling over and calling the police. Mr. Eisenhart was unable to describe the occupant(s) of either the red car or the small dark-colored car.

Mr. Eisenhart testified that C.F. was hit with shrapnel and injured. A.C. observed "blood running all down [C.F.'s] face," and C.C. testified that C.F. was "crying and bleeding" after the shooting. C.F. subsequently was transported to the hospital for treatment.

During C.C.'s testimony, the State introduced several photographs of C.F.'s face and head that illustrated "her wounds from the fragments and the glass on her face." C.C.

testified that C.F.'s facial injuries had since healed. She did have a small scar on the top of her head, but it was covered by her hair and not noticeable.

Police Investigations

Detective Adrienne Grant was assigned to investigate the shooting. During her review of video surveillance footage from the convenience store on the night of the shooting, she observed Mr. Brooks. He arrived in a red Crown Victoria wearing a blue zip-up like hooded jacket or sweatshirt and a winter hat, which was white and beige and had "kind of a puff ball on top." Mr. Brooks purchased some items from the store and then sat in his red Crown Victoria for a minute. He then moved his vehicle to another place in the parking lot and just sat there and "idle[d] for over 15 minutes." The video recording showed A.C. picking up Mr. Eisenhart in the minivan, and the red Crown Victoria following them out of the parking lot.

Believing that the most likely explanation for the shooting incident was retaliation for Mr. Eisenhart's testimony in the Daren Gray case, Detective Grant reviewed the logs at the Baltimore County Detention Center to determine who had visited Mr. Gray while he was incarcerated there. One of the names on the log was Mr. Brooks, who identified himself as Mr. Gray's brother. Detective Grant ran the names of Mr. Gray's visitors in the Motor Vehicle Administration ("MVA") database, and she determined that Mr. Brooks owned a red Crown Victoria. She confirmed that Mr. Brooks was the man in the convenience store video surveillance.

Mr. Gray's mother also visited him. Detective Grant determined that she was a joint owner, with Joshalyn Kendra Stone, appellant's sister, of a dark grey 2013 Volkswagen Jetta.

Mr. Brooks was arrested on March 5, 2014. At the time, he was wearing the distinctive winter hat that the man in the convenience store surveillance video was wearing. Police subsequently executed a search warrant on his Crown Victoria, and they recovered an "aqua blue zip-up Holister [sic] pull-up sweatshirt that matched the one that the individual in the convenience store was wearing" and two cell phones. One of those phones had a contact titled "Brother Khalifa."[3]

Appellant was arrested on March 5, 2014. Officers seized two cell phones that were in appellant's possession at the time he was arrested.

Police later seized Ms. Stone's Jetta, and a crime scene technician processed it for evidence. The technician recovered from the interior of the car a substance that a trace analyst later identified as being "consistent with gunshot residue or suggestive of gunshot residue." The technician also recovered a number of projectiles from the minivan and two "metal fragments" that were collected by hospital doctors during their treatment of C.F.

[3] Appellant later testified that Mr. Brooks, among others, called him "Brother Khalifa," and he confirmed that it was his phone number associated with that contact in Mr. Brooks' phone.

Trial

Ms. Stone testified that, on the evening of the shooting, appellant asked to borrow her dark grey 2013 Volkswagen Jetta. She stated that she gave appellant permission to use her car, but she "did not physically see him take it."

B.C., an inmate who shared a cell with appellant while serving a 60-day sentence for a drunk driving conviction, testified that, at some point during their collective detention, appellant became extremely emotional and began to talk about the shooting. B.C. stated that appellant "was upset that someone had done something to his brother. Somebody had . . . lied, set him up, put him in prison." Appellant told B.C. that his brother called him and told him that Mr. Eisenhart, the person who set up his other brother, was at Charlie Brown's. Appellant told his brother that "he was coming" and "not to lose him." Appellant then described how he "got into his car," drove past the convenience store towards Lillian Holt Road, "at which time he pulled up beside [Mr. Eisenhart], opened fire, and kept on giving it." B.C. testified that appellant thought Mr. Eisenhart was in the front passenger's side seat, which is why they drove along the right side of the minivan. After the shooting, appellant disposed of the handgun, but B.C. could not remember what kind of gun appellant said it was or how he got rid of it. B.C. also testified that appellant handed him a statement of charges and began pointing out how certain facts, such as the time and the description of a vehicle, were wrong.

B.C. realized that he could use this information to his advantage, later telling his wife that his chance encounter with appellant was his "scratch off lottery chance right here.

I've just got to do it right." In exchange for the information B.C. provided about the shooting, the court reduced his sentence and his conviction was stricken in favor of probation before judgment, which avoided points on his driver's license and allowed him to keep his driver's license.

Halfway through the second day of trial, the State indicated its intention to call Mr. Brooks to testify. The State filed a motion to compel Mr. Brooks to testify, granting him use and derivative use immunity.[4] Mr. Brooks' counsel, however, advised him to refuse to testify, even in the face of possible contempt charges. Mr. Brooks accepted his attorney's advice and refused to testify.

Because Mr. Brooks would not testify, the State asked the court to declare Mr. Brooks "unavailable" and permit the State to introduce his statements to police as "statements against penal interest." Appellant's counsel objected, stating that the defense had not had the opportunity to cross-examine Mr. Brooks, and the State engineered the unavailability of the witness. Discussion then ensued regarding whether the applicability of the Confrontation Clause of the Sixth Amendment was a distinct issue from the statement against penal interest hearsay exception. The State argued that *Crawford v. Washington*, 541 U.S. 36 (2004), did not "override" the hearsay exception. Counsel for appellant disagreed, arguing that, "as far as the confrontation clause," he did not "think that a hearsay exception or a rule would overrule a constitutional issue." The court permitted

[4] "Use and derivative use" immunity precludes the State from using in a later prosecution the testimony and any information derived, directly or indirectly, from that testimony. *State v. Rice*, 447 Md. 594, 605 (2016).

the State to introduce Mr. Brooks' statements, stating that their admission did not "offend the Hearsay Rule or otherwise the confrontation provisions that are articulated in either [*Crawford*] or the [*Bruton v. United States*, 391 U.S. 123 (1968)] decision and [its] progeny.[5]

Mr. Brooks' statements were introduced through Detective Grant. She testified that she interviewed Mr. Brooks after he was arrested. Mr. Brooks waived his *Miranda* rights and provided a statement. As discussed in more detail, *infra*, the prosecutor then played five clips of a video recording of Mr. Brooks' police interview.

Detective Eric Dutton, an expert in "call detail record analysis, mapping and plotting," testified that a number of calls were made on the night of the shooting between the cell phones recovered from appellant and Mr. Brooks. He examined the call records from those phones and plotted the call location data onto a map. Detective Dutton testified that appellant's cell phone contacted several cellular towers in the vicinity of the shooting and Ms. Stone's residence between 10:00 and 10:36 p.m. on the night of the shooting.

Appellant testified on his own behalf and denied any involvement in the shooting. He stated that he went to his mother's home on the night of the shooting and stayed there the whole night. He did admit to talking to his brother, Mr. Brooks, on his cell phone

[5] Although defense counsel below cited *Bruton v. United States*, 391 U.S. 123 (1968), in support of his argument, appellant wisely has abandoned this argument on appeal, stating: "*Bruton, supra*, and its progeny address joint trials where a statement is admissible against one defendant but not the other . . . . Because [a]ppellant was tried alone and Mr. Brooks' statement was offered as evidence against [a]ppellant, a *Bruton, supra*, analysis is not the correct analysis."

several times throughout that night, but he claimed that it was about a female friend, not Mr. Eisenhart.

On cross-examination, appellant admitted that he attended Mr. Gray's trial, at least for one day, and he was aware that Mr. Eisenhart's testimony was critical to the State's case.[6] He also confirmed that the man in the surveillance video from the convenience store was Mr. Brooks. When the prosecutor asked appellant why his cell phone was reportedly near his sister's house when he claimed to have never left his mother's house on the night of the shooting, appellant responded: "Like, the man came up here and explained upon movements. He never qualified what kind of movements. He said upon movements your phone go off of the strongest tower. So . . . to indicate that I just jumped from this place to that place -- I mean, that's just crazy."

DISCUSSION

Appellant's first argument is that the circuit court erred in admitting Mr. Brooks' statements to the police. Appellant asserts that the admission of these statements violated his Sixth Amendment right to confrontation because he did not have an opportunity to cross-examine Mr. Brooks.

The State contends that appellant's claim is not preserved for this Court's review. In any event, it argues that the admission of Mr. Brooks' statements to the police was not reversible error, asserting that the statements were either: (1) admissible as co-conspirator

[6] Appellant stated that he did not stay for the entire trial because he "got put out" by the trial judge.

statements; (2) inconsequential because they were cumulative to other testimony; or (3) did not directly implicate appellant.

I.

Proceedings Below

As indicated, in the middle of the second day of trial, the State granted Mr. Brooks use and derivative use immunity and attempted to compel him to testify. Mr. Brooks, however, on the advice of counsel, refused to testify.[7] The State moved to have the circuit court deem Mr. Brooks "unavailable" for the purposes of admitting his statements to police as a statement against penal interest.[8] Defense counsel argued that there was no legal basis to admit this testimony where appellant would not have the right to confront and cross-examine Mr. Brooks.

The prosecutor proffered that she had redacted any reference in the statements to appellant. She explained the statements that she intended to introduce, as follows:

[7] Mr. Brooks subsequently was tried separately. He was convicted of attempted first degree murder and related counts and sentenced to imprisonment for 70 years.

[8] Maryland Rule 5-804(b)(3) provides that the following is not excluded by the hearsay rule if the declarant is unavailable as a witness:

> Statement Against Interest. A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest, so tended to subject the declarant to civil or criminal liability, or so tended to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

> Okay. "I went to Charlie Brown's Convenience Store, I called" -- again, it's mute as to the reference to [appellant] -- "I followed the van. I told him what kind of car it was. I thought he was just gonna smack him around." Actually I won't try to introduce, "I thought he was just gonna smack him around." I think that that's, frankly, self-serving to Mr. Brooks. I won't offer that clip. I had planned to offer the one where detectives ask him, "Did you recognize Roland Eisenhart?" He says, "Yeah, I recognize him from the trial of my brother. I told him" -- and it's [a] reference to [appellant] but, again, [appellant's] name is not in there -- "that he was the person that testified against" -- and conveniently for me he says, "my brother" instead of our brother. He says, "I told him it was the guy who testified against my brother."

The prosecutor advised, in response to the court's question, that she was going to introduce testimony that a telephone call was made from Mr. Brooks' phone to appellant's phone. The court then asked the prosecutor whether there was "a distinction between the argument that's being advanced by the Defendant under the hearsay rules as opposed to that which is being advanced under Crawford versus Washington?" The prosecutor responded that a statement against interest had sufficient indicia of reliability to be admissible, and she stated that she was not aware of any authority that *Crawford* overruled that analysis.

At this point, the court put the issue regarding the admissibility of Mr. Brooks' statements on hold while the State questioned its next witness. The State subsequently called Detective Grant to testify. When the State began to question the Detective about interviewing Mr. Brooks, the following occurred:

> THE COURT: [W]e're at a point now where I imagine that the State is going to embark on a series of questions that will lead to -- it's the State's effort to introduce evidence of the statements that were made by Mr. Brooks, right?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Any final argument up here on the admissibility?

> [DEFENSE COUNSEL]: Just that I can't think of any other reason other than fundamental fairness. I mean, I can't image how prejudicial this is. I realize it might be probative for the State, but what this is gonna [sic] do and what I'm gonna [sic] have to do is -- well, I don't have any other legal argument at this time.

The court then ruled that it was going to admit Mr. Brooks' statements, noting that it previously had found him to be unavailable. The court continued:

> Under all the circumstances, I don't find that admission of these statements of Mr. Brooks offends the Hearsay Rule or otherwise the confrontation provisions that are articulated in either Crawford versus Washington or the Bruton decision and it's progeny on the issue of joinder.
>
> So I shall allow the evidence to be introduced. That evidence is in the form of utterances that in some way has substance. Mr. Brooks said, "I went to Charlie Brown's Convenience Store. I called -- then you're gonna obliterate the name of the person who was called. "I followed the minivan. I told -- you're gonna obliterate [appellant's] name as well, what kind of car it was." That's it, right?

The State subsequently played for the jury a number of clips from the recorded interview with Mr. Brooks. With respect to clips numbers 1 and 2, Detective Grant stated that it fairly and accurately depicted the room where the interview with Mr. Brooks was conducted, and it fairly and accurately depicted that portion of the interview with Mr. Brooks. The video recording was then played again for the jury, and the following occurred:

> [PROSECUTOR:] Clip Number 3, does that fairly and accurately depict that portion of your interview with Kenneth Brooks?
>
> [DET. GRANT:] Yes.
>
> [PROSECUTOR:] What was he describing for you at that time --
>
> [DEFENSE COUNSEL:] Objection.
>
> THE COURT: Overruled.

[DET. GRANT:] That clip is describing where he drove after he left Charlie's convenience store following [A.C.'s] van.

[PROSECUTOR:] Did he tell you why he was following that van?

[DET. GRANT:] Yes.

[PROSECUTOR:] Why?

[DET. GRANT:] When he was in the store he recognized Roland Eisenhart as the person who testified against his brother, Daren, ultimately leading to the 120-year sentence --

[DEFENSE COUNSEL:] Objection, your Honor.

THE COURT: Sustained to any further response. You have another question?

[PROSECUTOR:] Just another clip, your Honor.

(WHEREUPON, video recording is continued.)

[PROSECUTOR:] Does Clip Number 4 that I just played fairly and accurately depict that portion of Kenneth Brooks' interview?

[DET. GRANT:] Yes.

(WHEREUPON, video recording is continued.)

[PROSECUTOR:] Clips 1 through 5, were those fair and accurate representations of the statements Kenneth Brooks made to you about his own involvement in the shooting of [C.F.]?

[DET. GRANT:] Yes.

[PROSECUTOR:] Your Honor, at this time I move to enter State's Exhibit 51 into evidence.

THE COURT: Objection, overruled. Exhibit 51 is admitted.[9]

[9] Exhibit 51 was the DVD-R of the clips of the statements made by Mr. Brooks to the police.

The trial transcripts did not describe the contents of the recordings played at trial, but on August 24, 2016, appellant filed an unopposed motion to correct the record, which this Court granted, providing a DVD with six short video recordings and a transcript of those recordings. The transcript of the recordings provides as follows:

> [Clip 1:]
>
> MR. BROOKS: I know I stopped at Charlies Brown (sic) Convenient store to get my mom some cigarettes.
>
> DETECTIVE 1: What's it called?
>
> MR. BROOKS: Charlie Browns.
>
> DETECTIVE 1: Okay.
>
> [Clip 2:]
>
> MR. BROOKS: I had called -- (inaudible). I don't know.
>
> DETECTIVE 2: What did you say to him?
>
> MR. BROOKS: I said I think that's the guy that told him about --
>
> DETECTIVE 2: All right.
>
> [Clip 3:]
>
> DETECTIVE 1: How far did you follow it? Did you follow it all the way up to Kenwood?
>
> MR. BROOKS: Just -- just to -- to Hazelwood.
>
> [Clip 4:]
>
> MR. BROOKS: I was talking to (inaudible).
>
> DETECTIVE 1: Okay. As it's all going on?
>
> MR. BROOKS: I told him what kind of car it was.

[Clip 5:]

MR. BROOKS: I thought, you know, maybe he just --

DETECTIVE 1: Uh-huh.

MR. BROOKS: -- smack him around.[10]

[Clip 6:]

DETECTIVE 2: Would you recognize him from court that day you were there, or did someone point him out?

MR. BROOKS: Just that first time. I got good memory on, like, faces. Like, I'll never forget your all [sic] face.

II.

Preservation

The State argues that appellant "did not preserve [his] claim regarding the playing of a DVD containing his brother's recorded statements because he did not object at the time they were played." It contends that, although he challenged the admission of that evidence in a motion in limine, because appellant failed to make a contemporaneous objection or request a continuing objection, he failed to preserve this claim.[11] We disagree.

[10] In the circuit court, the prosecutor said that she was not going to play this clip, and the record refers to five clips played for the jury. At oral argument in this Court, counsel for appellant acknowledged this and stated that appellant's claim on appeal was based on the admission of the other five clips.

[11] The State alternatively asserts that the record demonstrates that the jury did not actually review the DVD, and therefore, "the admission of the DVD into evidence could not have affected their deliberations and thus could not have given rise to reversible error." There is no question, however, that portions of the statement were played for the jury. Thus, the critical issue is whether the admission of these statements was reversible error.

Maryland Rule 4-323(a) provides 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 objection become apparent." (emphasis added). In *Hall v. State*, 225 Md. App. 72, 89 (2015), we explained:

> While we have recognized that "there is no bright-line rule to determine when an objection should be made," *Prince v. State*, 216 Md. App. 178, 193-94, *cert. denied*, 438 Md. 741 (2014), it still "must come quickly enough to allow the trial court to prevent mistakes or cure them in real time." *Id.* at 194. This requirement serves to prevent a party from treating the trial as a sport and waiting until "it may be too late for the other party to recover . . . [before] seek[ing] to strike evidence." *Perry v. State*, 357 Md. 37, 77 (1999).

Id. (parallel citations omitted).

In *Clemons v. State*, 392 Md. 339, 361 (2006), the State made a claim similar to the one made here, arguing that the defendant "did not properly preserve his objection to the admission of Peters's expert testimony because he did not restate his objection after the completion of Peters's voir dire or during Peters's testimony." The Court of Appeals concluded that the claim was sufficiently preserved, explaining as follows:

> In the case at bar, after the State questioned Peters regarding his qualifications and offered him as an expert in [comparative bullet lead analysis, ("CBLA")], Clemons objected regarding the admissibility of the proffered scientific evidence and the trial court permitted him to conduct a voir dire examination of Peters without ruling on his objection. After the State asked several more questions on redirect, the State again proffered Peters as an expert in CBLA without objection by Clemons. The trial court then stated that it would qualify Peters as an expert in CBLA and permit him to testify concerning CBLA, and effectively overruled Clemons's prior objection. Although when additional information is adduced after the initial objection is made, the better practice is to renew the objection to ensure that the court is aware that the party intends to maintain its objection to the admission of the testimony, based on the facts of this record, the trial judge clearly understood that he was ruling on the defense's prior objection during

> voir dire to Peters's admission as an expert and the admissibility of the underlying scientific evidence, as well as the defense's outstanding motion *in limine* regarding Peters and CBLA. Moreover, there were no circumstances from which a reasonable person could infer that defense counsel, based on the subsequent voir dire, intended to withdraw his objection at the close of all voir dire. Furthermore, based on the proximity of Clemons's objection and the trial judge's ruling regarding the admissibility of the scientific evidence, we find no reasonable basis for distinguishing the present case from that before us in *Watson* [*v. State*, 311 Md. 370 (1988)]. Therefore, we determine that to require Clemons to restate his objection minutes after he originally made it would be to elevate form over substance and conclude that Clemons preserved the issue of the admissibility of Peters's expert testimony regarding CBLA and its implications for appellate review.

Id. at 362-63. *Accord Watson*, 311 Md. at 372 (objection preserved "in spite of the fact that he did not object at the precise moment the testimony was elicited" because requiring the defendant "to make yet another objection only a short time after the court's ruling to admit the evidence would be to exalt form over substance"); *Dyce v. State*, 85 Md. App. 193, 198 (1990) ("Given the temporal proximity between the ruling on the motion *in limine* and the prosecutor's initial inquiry on cross-examination we shall exercise our discretion under Md. Rule 8-131 and consider the issue, notwithstanding the lack of literal compliance with Rule 4-323(a).").

Here, appellant similarly made clear his objection to the admission of Mr. Brooks' recorded statements. Appellant's failure to restate his objection immediately thereafter was not fatal to consideration of the issue by this Court.

III.

Right to Confrontation

"The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment . . . provides, in pertinent part, that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Langley v. State*, 421 Md. 560, 567 (2011) (quoting U.S. CONST. amend. VI.). "[T]he Confrontation Clause bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross examination.'" *Clark v. State*, 188 Md. App. 110, 120 (2009) (quoting *Crawford*, 541 U.S. at 53-54 (2004)).

This Court recently discussed the evolving jurisprudence on testimonial hearsay:

> The [*Crawford*] Court concluded that the right of confrontation attaches to hearsay statements that are "testimonial." [541 U.S. at 51]. Without selecting any "comprehensive definition of 'testimonial,'" the Court reasoned that the term "applies at a minimum . . . to police interrogations," which are among "the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed." *Id*. at 68. The Court specifically noted that "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England," who performed "an essentially investigative and prosecutorial function" in producing evidence from witnesses who were not always under oath. *Id*. at 52-53. Consequently, the Court held that the recorded statements from the interrogation of Crawford's wife were testimonial. *Id*. at 68.
>
> * * *
>
> In [*State v. Norton*, 443 Md. 517 (2015)], the Court of Appeals' most recent opinion analyzing testimonial hearsay, the Court identified a number of inquiries that can be derived from *Crawford* and its successors. First of all, "[t]o whom the statement is made is a key component" in determining whether a statement is testimonial. *Norton*, 443 Md. at 530; *accord Clark*, 135 S. Ct. at 2182; [*Michigan v. Bryant*, 562 U.S. 344, 369 (2011)]. Because

> the involvement of government officials performing an investigative function implicates the core concerns of the Confrontation Clause (*Crawford*, 541 U.S. at 52-53, 56 n.7; *Bryant*, 562 U.S. at 358), statements made to law enforcement officers "principally charged with uncovering and prosecuting criminal behavior" are significantly more likely to be considered testimonial than statements made to others. *See Clark*, 135 S. Ct. at 2182.
>
> A concomitant inquiry looks to the purpose of the statement, specifically "whether, when viewed objectively, the challenged statement was 'made for the purpose of establishing or proving some fact' in a criminal prosecution or investigation." *Norton*, 443 Md. at 531 (quoting *Crawford*, 541 U.S. at 51). Typically, statements made in response to questions from law enforcement "are testimonial when the circumstances objectively indicate" that there is no ongoing emergency requiring police assistance "and that the primary purpose of the interrogation is to establish or to prove past events potentially relevant to later criminal prosecution." *Davis* [*v. Washington*, 547 U.S. 813, 822 (2006)]. This primary purpose determination "requires a combined inquiry that accounts for both the declarant and the interrogator" and looks to "the contents of both the questions and the answers." *Bryant*, 562 U.S. at 367-68. Not only "[t]he identity of an interrogator" but also "the content and tenor of [the] questions can illuminate the primary purpose of the interrogation." *Id.* at 369 (citations and quotation marks omitted).

Taylor v. State, 226 Md. App. 317, 335, 338-39 (2016) (parallel citations omitted).

We review *de novo* the question whether the admission of evidence violated a defendant's constitutional rights. *Id.* at 332. With that standard in mind, we review the decision in this case.

IV.

Analysis

The State does not suggest that the statements were not testimonial. Rather, it asserts that two of the statements were admissible as co-conspirator statements, one statement was cumulative to the other evidence, and two statements did not refer to appellant's actions.

We address first the State's argument regarding the following two statements: (Clip 2) "I had called – (inaudible)" and "said I think that's the guy that told him about --"; and (Clip 4) while it was going on, "I told him what kind of car it was." The State argues that these statements were admissible as statements made by a co-conspirator, an exception created by the Supreme Court in *Crawford*. In support, the State points to the following statement made by Justice Rehnquist in his concurring opinion in *Crawford*: "Because the statements are made while the declarant and the accused are partners in an illegal enterprise, the statements are unlikely to be false and their admission 'actually furthers the Confrontation Clause's very mission which is to advance the accuracy of the truth-determining process in criminal trials.'" 541 U.S. at 74 (Rehnquist, J., concurring) (quoting *United States v. Inadi*, 475 U.S. 387, 396 (1986)) (internal quotation marks omitted).

Although Justice Rehnquist's statement in *Crawford* was made in a concurring opinion, other courts subsequently have held that co-conspirator statements made during the course of a conspiracy generally do not violate the Confrontation Clause because they are, by their very nature, non-testimonial. *See United States v. Jackson*, 636 F.3d 687, 694 (5th Cir. 2011) ("[S]tatements made by a coconspirator during the course and in furtherance of a conspiracy . . . 'are by their nature generally nontestimonial and thus are routinely admitted against an accused despite the absence of an opportunity for cross-examination.'") (quoting *United States v. Holmes*, 406 F.3d 337, 348 (5th Cir. 2005)); *United States v. Hargrove*, 508 F.3d 445, 448 (7th Cir. 2007) (co-conspirator statements "are neither hearsay nor 'testimonial' as the Supreme Court has defined that term"); *United*

States v. Martinez, 430 F.3d 317, 329 (6th Cir. 2005) ("[A] reasonable person in the position of a coconspirator making a statement in the course and furtherance of a conspiracy would not anticipate his statements being used against the accused in investigating and prosecuting the crime," and therefore, generally they "are not testimonial in nature."), *cert. denied*, 547 U.S. 1034 (2006).

We agree that statements of a co-conspirator, made during the course and in furtherance of a conspiracy, generally would not be testimonial. Therefore, the admission of such a statement generally would not violate the Confrontation Clause. Thus, if Mr. Brooks' statements to appellant on the night of the shooting, co-conspirator statements made in furtherance of a conspiracy to harm Mr. Eisenhart, had been secretly recorded, admission of these statements would not violate the Confrontation Clause.

Here, however, the statements admitted were not what Mr. Brooks told appellant, but rather, what Mr. Brooks told the police detectives while he was in their custody.[12] These statements, which were made to law enforcement for the primary purpose to prove past events potentially relevant to a criminal prosecution, clearly were testimonial.

Accordingly, we hold that the circuit court abused its discretion in allowing the State to introduce into evidence Mr. Brooks' recorded statements to the police where appellant was not afforded the opportunity to cross-examine Mr. Brooks.

[12] The State clarified at oral argument that it was not arguing that the conspiracy was ongoing at the time of these statements.

V.

Harmless Error

Although not argued in its brief, the State argued during oral argument that, even if the admission of Mr. Brooks' recorded statements to the police detectives was error, it was harmless error that did not require reversal of appellant's convictions. It contends that the statements were duplicative of other evidence, particularly the testimony of appellant's cellmate, B.C., the convenience store videotape that showed Mr. Brooks and Mr. Eisenhart in the store at the same time, the testimony that Mr. Brooks and appellant attended Mr. Gray's trial, the cell phone evidence showing several phone calls that were made between appellant and his brother, and the location data gleaned from the cell phone records. We disagree.

The Court of Appeals has set forth the standard for assessing harmless error as follows:

> [W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated. Such reviewing court must thus be satisfied that there is no reasonable possibility that the evidence complained of – whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.

Dorsey v. State, 276 Md. 638, 659 (1976). *Accord Morris v. State*, 418 Md. 194, 221-22 (2011).

Here, the statement of Mr. Brooks, that he called someone and told that person the kind of car that Mr. Eisenhart was in prior to the shooting, was a significant piece of

evidence given the evidence that Mr. Brooks had called appellant during the time immediately prior to the shooting. This evidence tended to contradict appellant's testimony that, although he talked to his brother on the phone that night, his conversations were not related to Mr. Eisenhart.

To be sure, B.C. testified that appellant stated that his brother called him and told him that Mr. Eisenhart was at Charlie Brown's. B.C.'s credibility, however, was challenged by the defense, given that he was granted a reduced sentence in exchange for his testimony. B.C.'s statement that he won the "lottery," as a result of this conversation, could have led the jury to discount his testimony. Mr. Brooks' statements, to the extent that they corroborated B.C.'s testimony and contradicted appellant's testimony, potentially contributed to the jury's verdict. Accordingly, we cannot conclude that the admission of Mr. Brooks' statements was harmless, and therefore, appellant is entitled to a new trial.[13]

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. COSTS TO BE PAID BY BALTIMORE COUNTY.

[13] Because we reverse on this ground, and the other issues raised by appellant may not arise on retrial, we will not address the remainder of appellant's contentions.