UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2074

September Term, 2011

JOHNNY BUTLER

v.

STATE OF MARYLAND

Graeff,
Friedman,
Salmon, James P.
(Retired, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: September 4, 2015

On January 26, 2007, the lifeless body of Sintia Mesa ("Ms. Mesa") was found naked in her car. She had been tortured and died from strangulation. On October 19, 2009, a grand jury in the Circuit Court for Baltimore City indicted appellant, Johnny Butler ("Butler"), along with one Calvin Wright ("Wright"), for first degree murder, conspiracy to commit first degree murder, and other crimes related to the death of Ms. Mesa.[1]

After a six-day trial concerning the just mentioned charges, a jury convicted Butler of first degree murder, conspiracy to commit murder, and third degree sexual offense. The jury acquitted Butler of first and second degree rape. Butler was sentenced to life imprisonment for first degree murder, a consecutive life sentence for conspiracy to murder, and a ten-year consecutive sentence for the third degree sexual offense conviction.

Butler filed this timely appeal and raises two questions, which we have reordered and reworded:

> 1). Did the trial court commit reversible error in admitting the hearsay statement of Calvin Wright, Butler's alleged coconspirator?
>
> 2). Did the trial court erroneously permit the State to introduce testimonial statements of a non-testifying medical examiner through the in-court testimony of another medical examiner?[2]

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[1]Prior to Butler's trial, Calvin Wright pled guilty to the crime of conspiracy to murder Sintia Mesa.

[2]Butler phrased the questions presented as follows:

> (1) Did the trial court erroneously permit the State to introduce testimonial statements of a non-testifying medical examiner through the in-court testimony of a medical examiner who did not make the ultimate determination

(continued...)

I.
BACKGROUND

Evidence introduced at trial showed that appellant, Butler, as well as Jermarl Jones ("Jones"), Walter Horton ("Horton"), and Wright were all Baltimore City drug dealers at the time Ms. Mesa was murdered.

In January of 2007, Jones was Ms. Mesa's live-in boyfriend. At the time of Ms. Mesa's murder, Jones kept about $100,000 in a storage unit rented from Route One Self Storage, a facility located in Laurel, Maryland. Ms. Mesa, before her murder, had access to that unit as well as to a separate storage unit that was rented from Route One Self Storage.[3]

The State's theory of the case was that Butler, along with a coconspirator, Wright, abducted Ms. Mesa on the afternoon of January 26, 2007, tortured her so that she would tell them the security code that would allow them to gain entrance into the self-storage units used by Jones and Ms. Mesa, and afterward Butler and Wright broke into Jones's storage unit and stole over $100,000 from that unit. Also, according to the State's theory of the case, Butler sexually molested Ms. Mesa and, along with Wright, killed her.

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[2](...continued)
as to cause and manner of death and where Appellant had no opportunity to confront the non-testifying medical examiner?

2) Did the trial court err in admitting an alleged accomplice's hearsay statements made to a third party?

[3]One of the storage units was rented by a relative of Ms. Mesa, but Ms. Mesa was listed as a party with permission to access that unit.

A. Ms. Mesa's Disappearance

Ms. Mesa, the murder victim, operated a beauty salon called Coco Brown in Pikesville, Baltimore County, Maryland. On the morning of January 26, 2007, Ms. Mesa and her sister talked on the phone. During that phone conversation, Ms. Mesa said she was headed into work at her hair salon. She also said that because the weather was very cold, she was wearing "a black sweat suit and a mink coat." Next, at 11:00 a.m. on January 26, 2007, Ms. Mesa sent her sister a text message. Her sister never heard from Ms. Mesa again.

At approximately 9:00 p.m. on January 26, 2007, friends and relatives of Ms. Mesa became worried because they could not contact her. Two days later, on January 28, 2007, the police received a call notifying them that a cell phone had been found in a dumpster. It was later learned that the cell phone belonged to the decedent. The police searched the dumpster and found many items that belonged to the decedent. Among the items recovered in the dumpster were Ms. Mesa's mink coat and her sweat pants.

B. The Relationship Between Jermarl Jones and Butler

Jermarl Jones, decedent's boyfriend, testified that Butler knew him very well and that they spent a lot of time together before Ms. Mesa was killed. Nevertheless, in the period between June, 2006, and January 6, 2007, Butler and Jones saw each other much less frequently because there was a federal fugitive warrant out for his [Jones's] arrest; the existence of the warrant caused Jones to do everything he could to elude capture including avoiding occasions when he would be in Butler's company.

C. Gerald Wilkerson's Testimony

Gerald Wilkerson ("Wilkerson"), an acquaintance of both Butler and Jones, testified that at the beginning of 2007 he had a conversation with Butler about money. Butler told Wilkerson that he didn't "mess with" Jones anymore because Jones owed him $50,000. Butler also told Wilkerson that he knew how to get Jones "where it hurt" and that was through "his girl." He also said he knew where Jones kept his money.[4]

D. Discovery of the Fact that Jones's Money was Missing

Randy Stealy (Mr. Stealy"), the manager and owner of Route One Self Storage, testified that in January of 2007, his facility was monitored by security cameras on a 24 hour per day basis. He testified that once the appropriate security code was punched in at the entrance to the facility, the computer would disarm the alarm to the unit being accessed. In regard to one of the storage units to which Ms. Mesa had access, Mr. Stealy testified that he found that the latch to that unit had been cut. He explained that a gate code had been used that allowed Ms. Mesa's car to enter the facility on January 26, 2007. He further explained that when customers rent more than one unit, it takes more than one code to silence both

[4]Wilkerson, like many of the witnesses that testified in this case, had a history of selling illegal drugs. During his testimony, Wilkerson admitted that he was awaiting sentencing for a federal drug conspiracy conviction and that he had entered into a plea agreement with the U.S. Attorney's Office in which the government had agreed to lower the federal sentencing guidelines for his conspiracy conviction by two levels in exchange for Wilkerson's testimony in the subject case.

alarms. The code used on January 26, 2007 only disarmed the alarm to one of the units to which Ms. Mesa had access.

Mr. Stealy further testified that the unit with the broken lock was rented by the decedent, Ms. Mesa. Mr. Stealy provided police officers with videotapes of the gate logs for January 26, 2007. Those videotape logs showed that Ms. Mesa's vehicle, a grey Toyota Solara, entered the storage facility property at 2:50 p.m. and left at 3:40 p.m. on January 26, 2007.

E. Additional Testimony of Jones

Jones testified that when he heard of Ms. Mesa's disappearance he was in New York City. He returned to Baltimore at approximately 2:00 a.m. on January 27, 2007. Later that day, he went to the storage facility (mentioned previously) where he rented two units. In regard to one of the units, the outside lock was off and the unit was open with clothes and shoes and other items of personal property scattered "everywhere." He testified that he kept "[a] little over $100,000" in one of the storage units. He discovered the money was missing on January 27, 2007. He did not immediately report this theft to the police because the missing money was earned from his sale of drugs. He did, however, talk to the manager of the storage facility who called the police.

Jones further testified that Butler, who was like a brother to him, knew that Ms. Mesa was his (Jones's) girlfriend. On cross-examination, Jones clarified his testimony by

explaining that he had rented two storage units; but one of the units was in the name of Ms. Mesa and the other was in his name.

F. Testimony of Walter Horton

Walter Horton, an acquaintance of Wright and Butler, testified that in January 2007, he was at a house located at 707 Macdill Way, Baltimore County, Maryland. The house was rented in Butler's name and was used as a "social house." Horton arrived at the social house at approximately 7:00 a.m. on January 26, 2007. Later that day, at approximately 5:00 p.m., Wright came to the social house and asked him to follow him out to the garage and to open it. Horton went to the garage, opened it, and watched Wright drive Ms. Mesa's silver Toyota Solara automobile into the garage. At that point he saw Butler in the back seat of the vehicle.[5] Wright then asked Horton if he would give him a ride. Horton agreed to do so. Next, driving his own vehicle, Horton drove Wright to where Wright's green Dodge Caravan was parked. According to Horton, the Dodge Caravan was parked in front of Coco Brown Salon which, as previously mentioned, was owned by the decedent. Afterward, Horton drove to a residence that he shared with his mother.

When Horton was later interviewed by police officers, he selected Wright's picture out of a photographic lineup as the person to whom he had given a ride to Coco Brown

[5] Prior to trial, Mr. Horton made a statement to a law enforcement officer in which he indicated that he was not sure that Butler was the person he saw in the back of the vehicle.

Salon. This identification was made on August 29, 2009, which was more than two and one-half years after the murder. At trial, over objection, Horton read to the jury what he wrote on the back of Wright's photograph, *viz.*:

> I know Turkey [Mr. Wright] as one who, on the date Ms. Mesa's car showed up at Butler's rental home[;] I answered the door and he told me to leave because him and JR [Butler] were up to something, and he asked me [to] open the garage, and he drove Ms. Mesa's car inside the garage. And then he asked me to give him a ride to where he had left his parked van, and it was in Randallstown, where Ms. Mesa was last seen at her hair salon. She had visited hours before.

(Emphasis added.)

Horton also testified that about two months after Ms. Mesa's murder, at a price of about $27,000, Butler purchased nine pounds of marijuana from him. Butler paid in cash.

G. Discovery of Ms. Mesa's Body

On January 29, 2007, Ms. Mesa's Toyota automobile was found in the parking lot of an apartment complex located in the 5700 Block of Crest Way in Baltimore City. When Ms. Mesa's body was found in the car's trunk, it had numerous cut marks on it.

H. Other Materials Found in the Dumpster

Among the items found on January 28, 2007 in the dumpster near where Ms. Mesa's cell phone was recovered, were other items belonging to the decedent including a shoulder bag, a wallet, and a black t-shirt with duct tape attached. Also found in the dumpster were floor mats from a car like the one owned by the decedent and a bag with a piece of duct tape stuck to it.

I. DNA Evidence

Jocelyn Carlson ("Ms. Carlson"), a DNA analyst employed by the Baltimore City Police Department, was allowed by the court to give her opinion as an expert in forensic DNA analysis. She testified that a total of 50 items were tested for DNA in the subject case. Forty-eight of those items had DNA residue that was not consistent with Butler's DNA profile. Ms. Carlson testified, however, that a sample taken from Ms. Mesa's body yielded a DNA profile consistent with a mixture of DNA from Ms. Mesa and Mr. Butler at 11 of 14 loci (testing locations). Another DNA sample was extracted from the duct tape that was found attached to a bag containing items belonging to Ms. Mesa. and found in a dumpster. The duct tape yielded a DNA profile consistent with that of Ms. Mesa, Wright, Butler, and someone else. On another part of that duct tape, according to Ms. Carlson, was DNA from four unidentified individuals.

Dr. Karl Reich testified on behalf of Butler, as an expert in DNA analysis. According to Dr. Reich, it was not possible to identify Butler, or anyone else, as a contributor to the two samples that Ms. Carlson had identified as having DNA consistent with that of Butler. Dr. Reich opined that both of these samples were mixtures of the DNA from at least two, three, or four people and only the victim could be credibly identified as part of that mixture. He further opined that applying the Baltimore City Police Department's own criteria for exclusion, Butler should have been excluded as a contributor to one of the two samples.

J. Motion *In Limine*, Autopsy Report, and Testimony of Mark Shelly, M.D.

The autopsy of Ms. Mesa was performed by Dr. Mark Shelly on January 29, 2007. He testified that it took him between two and three hours to complete the autopsy.

Before Dr. Shelly began his testimony, counsel for Butler made a motion *in limine*. The *in limine* motion was based on two grounds. First, appellant contended that Dr. Shelly was not qualified to give an expert opinion in this case. The second reason, was expressed by defense counsel as follows: "under *Bullcoming* [*v. New Mexico*, 131 S.Ct. 2705 (2011)], *Melendez-Diaz* [*v. Massachusetts*, 557 U.S. 305 (2009)], if Dr. Shelly were allowed to testify, the defendant's right to confront witnesses would be violated under the Federal Constitution."

At the *in limine* hearing, Dr. Shelly testified that he had been licensed to practice medicine in Virginia since 1999. After he graduated from medical school at the Western University of Health Science in California, Dr. Shelly did his residency in pathology under the supervision of the "Armed Forces Medical Examiner System" in Maryland. In January, 2007, when he performed the Mesa autopsy, Dr. Shelly was doing his fellowship training in forensic pathology. Four months of that training was spent at the Office of the Chief Medical Examiner (OCME) in Baltimore. He was at the medical examiner's office between November 2006 and March 2007. At the time of trial, Dr. Shelly was a Commander in the United States Navy and stationed at the Naval Hospital in Portsmouth, Virginia.

Dr. Shelly testified that as of the date of trial he had performed approximately 400 autopsies. His speciality was "[a]natomic and forensic pathology." He has been board certified in anatomic and clinical pathology since 2005 and has been board certified in forensic pathology since 2007.

During the motion *in limine* hearing, Dr. Shelly testified that in the four months that he was with the OCME in Baltimore, he performed autopsies "almost every day." His duties, during his fellowship training, were to perform autopsies and to write a report concerning each autopsy he performed. Each autopsy report he wrote included his opinion as to the cause of death.

During cross-examination, at the motion *in limine* hearing, Dr. Shelly admitted that at the time he performed the autopsy on Ms. Mesa, he was not board certified in forensic pathology. He also admitted that the autopsies that he performed were under the direct supervision of an assistant medical examiner at the OCME. When Dr. Shelly wrote his first report concerning Ms. Mesa's autopsy, it was a preliminary report only. The final report was reviewed by Dr. Tasha F. Greenberg, an assistant medical examiner. He explained that although he performed the autopsy, Dr. Greenberg was in the same room and supervised his performance to make sure that the correct protocols and procedures were being followed.

On cross-examination, defense counsel established that when the preliminary report was completed by him, it was not likely that the toxicology report had been completed. In

that regard, Dr. Shelly said he honestly didn't know whether the toxicology report had been completed by the time he left the OCME, which was toward the end of March, 2007.[6]

Dr. Shelly said that he couldn't recall how many edits were made by Dr. Greenberg to the first draft before the autopsy report was "finalized." He testified that "[t]he standard procedure was that [he] would submit [his] first draft to Dr. Greenberg. She would then make recommendations and then [he] would most likely write a second draft that she would hold on to and make changes to once everything was finalized." Although he could not say for sure, he testified that it was "most likely" that he wrote both the first and the final draft of the autopsy report because that was standard procedure. He added that Dr. Greenberg would then "incorporate any findings from the trace analysis toxicology reports, microscopic studies as they [later] became available . . . ." He further acknowledged that Dr. Greenberg signed Ms. Mesa's death certificate because doctors doing their fellowships, "are not allowed to sign death certificates."

On redirect examination, Dr. Shelly emphasized that although Dr. Greenberg would be "responsible" for what was said in the final autopsy report, that report would have been written by him. He added that he was "99% positive" that he did the "anal, oral and rectal swabs" of Ms. Mesa's body because that was his responsibility. He would have also

[6]The records show that the toxicology report, which was part of the autopsy, was dated February 2, 2007; this date was almost two months before Dr. Shelly left the OCME. That report was negative for drugs or alcohol.

examined "skin samples" and Dr. Greenberg would then approve any preliminary findings that he made about those microscopic examinations. He concluded his testimony at the *in limine* hearing by testifying that there were no differences in the opinions and conclusions reached as reflected in the rough draft that he wrote and in the "finalized autopsy report."

At the conclusion of the motion *in limine*, the trial judge ruled that Dr. Shelly was qualified to testify as an expert and to testify about the autopsy he performed on Ms. Mesa's body.

Before the jury, Dr. Shelly related his background and credentials in accordance with his testimony during the motion *in limine*. Also, in his testimony before the jury, Dr. Shelly identified State's Exhibit No. 39 as Ms. Mesa's autopsy, which was prepared at the OCME. State's Exhibit No. 39 was signed by Dr. Shelly, Dr. Greenberg, and by the Chief Medical Examiner for the State of Maryland, Dr. David Fowler. Before allowing the exhibit to be introduced, the trial judge asked defense counsel whether she had any objection; defense counsel replied "No. Your Honor." The judge then said "there being no objection, so [the Exhibit is] admitted." State's Exhibit No. 39, under the caption "Opinion," read as follows:

> This 25 year old, Hispanic female, SINTIA MESA, died of ASPHYXIA. The injuries identified at the time of autopsy are consistent with ligature strangulation, however a component of manual strangulation cannot be entirely ruled out. Additional injuries included abrasions and contusions on the upper extremities, buttocks, right thigh and left great toe, some similarly patterned to those on the neck, as well as a broken fingernail. The manner of death is HOMICIDE.

During his direct examination, Dr. Shelly testified, without objection, that to a reasonable degree of medical certainty, the cause of Ms. Mesa's death was "[a]sphyxia" and that the "manner of death" was "[h]omicide."

During Dr. Shelly's direct testimony, four photographs of Ms. Mesa's corpse were introduced. Dr. Shelly testified that the pictures fairly and accurately depicted what the decedent's body looked like at the time he performed the autopsy. At that point in the trial, which was ten transcript pages after the autopsy report had been admitted into evidence, defense counsel said that she had "completely misspoke" when she said that she did not object to the autopsy report. The judge then admitted the autopsy photographs.

Also admitted into evidence during Dr. Shelly's testimony were the notes Dr. Shelly made contemporaneously with performing the autopsy. In his notes, Dr. Shelly diagramed the decedent's body and then showed on that diagram where her injuries were located. Defense counsel objected to the notes being admitted into evidence because: 1) Dr. Shelly, purportedly, was not qualified to give a medical opinion in this case; and 2) the notes reflected "findings" that "would have had to have been reviewed by Dr. Greenberg." The objections were overruled. Also during Dr. Shelly's testimony, another diagram by Dr. Shelly was admitted. That diagram [State's Exhibit No. 45] depicted the front and back of the decedent's hands and showed the injuries to her hands. After the notes and diagrams were introduced, Dr. Shelly went over, in detail, all of the injuries and abrasions that he found on the decedent's body and told the jury exactly where the injuries were located. On

cross-examination, Dr. Shelly stated that his examination of Ms. Mesa's body was "very extensive."

Dr. Shelly said on recross-examination that the swabs he took from Ms. Mesa's body were sent to an outside source for testing but the "oral, anal and vaginal swabs" came back negative for sperm.

II.
ANALYSIS

A. Coconspirators Exception to the Hearsay Rule

As mentioned earlier, Horton was allowed to read to the jury what he had written (on the back of Calvin Wright's photograph) concerning what Wright said after arriving at the "social house." Horton wrote that Wright told him "to leave because [he] and [Butler] were up to something." (Emphasis added.) At trial, counsel for Butler objected to Horton reading aloud Wright's statement that he and Butler "were up to something." Appellant's counsel maintained that this part of the statement violated the rule against hearsay.

In this appeal, the parties agree that the words at issue met the definition of hearsay. They disagree, however, as to whether the coconspirators' exception to the hearsay rule applied.

Md. Rule 5-803(a)(5) sets forth what is commonly known as the coconspirators' exception to the hearsay rule, which reads, in pertinent part, as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (a) Statement by party-opponent. A statement that is offered against a party and is:
>
> * * *
>
> (5) a statement by a coconspirator of the party during the course and in furtherance of the conspiracy.
>
> In overruling the objection by defense counsel, the trial judge said:
>
> Your objection is noted. Your client is also charged with conspiracy in light of the fact that the charge is before the court. The court overrules the objection in light of the conspiracy charge. Objection overruled.

Butler argues on appeal that the trial judge "erred in admitting the alleged coconspirator's hearsay statements on the basis that he [appellant] was charged with a conspiracy" along with Wright.

Appellant points out that the rule in Maryland is that "before the declarations of one conspirator are admissible against a coconspirator, the existence of the conspiracy and the connection of the coconspirators therewith must be established." In support of that argument he cites *Mason v. State*, 18 Md. App. 130, 136-37 (1973). Butler also argues that the aforementioned rule is applicable where, as here, declarations of the coconspirator are sought to be introduced through a third person, such as Horton. Butler maintains that Horton should not have been allowed to testify as to what the coconspirator (Wright) told him (Horton) until Butler's connection with the conspiracy "is prove[n] by evidence *aliunde*

(evidence independent of the declarations themselves)." For this proposition, Butler cites, once again, *Mason*, *supra*.

The State counters:

> Butler challenges the existence of independent evidence of a conspiracy, and that the statement was made in the course of and in furtherance of the conspiracy. The record does not support his contention.
>
> As the [trial] court noted, Butler was charged with conspiracy. The court had also accepted Wright's guilty plea to conspiracy to commit murder at a proceeding a few days prior to the start of Butler's trial. This included a factual recitation that Wright and Butler arrived at Horton's home and asked to store Mesa's car in his garage, and that Wright asked Horton to drive him back to Horton's van, parked near Mesa's hair salon. This, alone, was sufficient to allow the court, in its gatekeeper role, to determine that there was sufficient evidence of a conspiracy; Wright had admitted to it in open court. It was not clearly erroneous for the trial court to take judicial notice of this fact, as it had occurred before the same judge only a week earlier. *See* Md. Rule 5-201 (court may take judicial notice of "adjudicative facts.")

(References to record omitted.)

We reject the State's argument that the "foundational requirements" were met by the fact that both appellant and Wright had been indicted for conspiracy, coupled with the fact that Wright had pled guilty to being a coconspirator with Butler before the same judge as the one who presided at Butler's trial.

The general rule setting forth and explaining the coconspirators' exception to the hearsay rule, as applied in Maryland, can be found in *McLain*, Maryland Evidence–State and Federal, Volume 6A (2nd ed. 2001) § 801(5):1(b) (hereinafter "*McLain*"), which states:

b. Required Foundation Facts

> In order for one person's statements to be admissible against a coconspirator, the Maryland case law has required a *prima facie* showing of both the conspiracy and of the declarant's and the other coconspirator's participation in it, independent of the statements themselves. This showing must be sufficient, under Rule 5-104(b), to support a finding by the jury of those two facts by a preponderance of the evidence. In the court's discretion, it may admit proof of the coconspirator's statements subject to connecting up by later proof of these foundation facts.

McLain at page 150. (Emphasis added, footnotes omitted). *See also* Maryland Evidence Handbook (4th ed. 2010) Joseph F. Murphy, Jr., § 805(D)(1), page 408.

The fact that Wright and Butler had been indicted for conspiracy to commit murder was not a fact that the judge could weigh in determining whether the State had made a *prima facie* showing that a conspiracy existed or that the statement was made in the course of the conspiracy. The same can be said concerning the fact that Wright pled guilty to that charge. First, in order to meet the foundational requirements of Md. Rule 5-803(a)(5), evidence showing the conspiracy must be presented to the jury. *McLain*, *supra*. Moreover, it would have been reversible error to admit evidence of Wright's guilty plea into evidence. *Casey v. State*, 124 Md. App. 331, 340 (1999) (evidence of coconspirator's guilty plea erroneously not stricken by the court).

The State argues, in the alternative, that even if a sufficient foundation had not been established at the time the hearsay statement was admitted, the error was harmless because the evidence later introduced by the State clearly established a *prima facie* case that

appellant and Wright were coconspirators and that the statement by Wright was made "in the course of and in furtherance of the conspiracy." According to the State, the only "error" on the part of the trial judge was that the judge allowed the hearsay statement into evidence too early. Viewed in that manner, the error was harmless, beyond a reasonable doubt, according to the State. The State words its argument as follows:

> Harmless error exists when "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[.]" *Dorsey v. State*, 276 Md. 638, 659 (1976). Thus, "[e]very error committed by a trial court is not grounds for a new trial. Reversible error will be found and a new trial warranted only if the error was likely to have affected the verdict below. If the error is merely harmless error, then the judgment will stand." *Conyers v. State*, 354 Md. 132, 160, *cert. denied*, 528 U.S. 910 (1999) (citations omitted).
>
> To the extent that the error was in the lack of sufficient foundation to establish the existence of a conspiracy at that point, the State presented copious evidence of such a conspiracy in the rest of its case-in-chief, and the only "error" would have been in admitting the statement while Horton was on the stand, rather than admitting it provisionally conditioned upon the presentation of additional facts. Md. Rule 5-104. After Horton testified, there was evidence that DNA testing had found mixed samples of biological evidence on Mesa's body consistent with a mixture of Mesa, Wright, and Butler. Further, there was testimony that Mesa disappeared sometime between 11 a.m. and 9 p.m. on January 26. Moreover, there was testimony that over $100,000 was missing from the storage unit which had been broken into on the afternoon of Mesa's disappearance. If the previously discussed evidence were not enough [i.e., the evidence introduced before Horton testified] that evidence combined with the DNA evidence, the estimated time of Mesa's disappearance, and Butler's financial recovery immediately after the theft of $100,000 from Mesa's storage locker, was sufficient to establish the existence of a conspiracy involving both Butler and Wright when they arrived at the "social house" on the afternoon of January 26. Because this information was part of the State's case-in-chief, Butler suffered no harm in allowing Horton

> to relate Wright's statement before the testimony of the DNA analyst and Mesa's sister.

(Emphasis added, references to record omitted).

In the excerpt just quoted, the State accurately summarizes the evidence (showing that a conspiracy existed) that was admitted after the admission of the statement indicating that Wright had asked Horton to leave because Wright and appellant "were up to something." Moreover, earlier in its brief, the State accurately summarized the evidence of a conspiracy that was admitted into evidence before Horton quoted Wright as having uttered the remark that he and appellant were "up to something." The last mentioned summary was as follows:

> [P]rior to Horton's testimony regarding Wright's statement, the State had produced evidence showing that Mesa's Toyota Solara, with Mesa's body in the trunk, was found in an apartment complex in the Park Heights neighborhood of northwest Baltimore. They were notified that on the afternoon of January 26, someone had entered a self-storage complex using a passcode for a storage unit Mesa was authorized to access, but then went to another storage unit in Mesa's name and broke the lock. And the State provided evidence that on the same afternoon, January 26, Horton was at a "social house" he rented with Mr. Butler when Mr. Wright arrived, rang the doorbell, and told Horton to leave. Horton then went outside with Wright and opened the garage door, and saw Wright pull Sintia Mesa's Toyota Solara into the garage. Horton saw Butler in the back of the car. Then, in response to a request from Wright, Horton drove Wright to Wright's van, parked in front of Mesa's hair salon on Liberty Road. Wright and Butler, Horton observed, "were always together." Further, Horton believed that Butler was in financial straits at the time he saw Butler and Wright bring Mesa's car to the garage, but after the murder, Butler paid Horton $27,000 for nine pounds of marijuana.

(References to record omitted).

In *Grandison v. State*, 305 Md. 685 (1986), a death penalty case, the Court of Appeals said:

> Grandison next argues that the trial judge erred in allowing the admission of hearsay evidence under the co-conspirator exception to the hearsay rule. This is so, he argues, because the State had not proven the existence of a conspiracy by independent proof showing his participation therein. Furthermore, he argues that several of the statements related to matters not within the scope of the conspiracy and several statements were made by someone not alleged to be part of a conspiracy. After reviewing the record we perceive no merit to Grandison's contentions.
>
> Grandison concedes that out of court declarations of one conspirator made during the course of and in furtherance of the conspiracy are admissible against a co-conspirator as an exception to the hearsay rule. *See Greenwald v. State*, 221 Md. 245, 157 A.2d 119, *appeal dismissed*, 363 U.S. 721, 80 S.Ct. 1599, 4 L.Ed.2d 1521 (1960). What Grandison seems to argue is that before this hearsay exception is available, there must be a prima facie showing of the existence of a conspiracy and his participation therein.
>
> To the contrary, it is not necessary that a conspiracy be conclusively established *before* the declarations are admissible. Flexibility in the order of proof is allowed. *Greenwald*, 221 Md. at 257, 157 A.2d at 126; *see Hill v. State*, 231 Md. 458, 461, 190 A.2d 795, 796, *cert denied*, 375 U.S. 861, 84 S.Ct. 127, 11 L.Ed.2d 87 (1963); *Mason, Taylor and Taylor v. State*, 18 Md. App. 130, 137, 305 A.2d 492, 497 (1973).

Id. at 733-34 (emphasis added).

As the *Grandison* case illustrates, the fact that the State failed to prove a conspiracy prior to the admission of the coconspirator's statement does not necessarily mean that the defendant is entitled to a new trial. Here, as in *Grandison*, by the end of the State's case-in-chief, evidence was introduced that easily met the State's burden of making a *prima facie* showing that at the time the coconspirator (Wright) made the statement at issue, Butler and

he had conspired to kill Ms. Mesa and had: 1) either already killed Ms. Mesa and were engaged in a conspiracy to dispose of Ms. Mesa's car and body; or 2) had not yet killed her but later killed her and disposed of her body and automobile. That evidence is accurately set forth in the portion of the State's brief quoted *supra*, and need not be repeated. Under such circumstances, we agree with the State's argument that Butler was not prejudiced by the fact that Wright's statement was admitted prior to the State having made a *prima facie* case showing a conspiracy.

Appellant argues that even if a *prima facie* showing of a conspiracy was made in the State's case-in-chief, the State failed to prove that the statement was made "in furtherance of" the conspiracy. Appellant phrases this argument as follows:

> Here, the statement, that "him and JR [Butler] were up to something," cannot be considered one "intended to promote the objectives of the conspiracy," such that they could be considered to have been uttered "in furtherance" of it. Despite being interpreted broadly, *Walker v. State*, 144 Md. App. 505, 542 (2002), *rev'd on other grounds*, 373 Md. 360 (2003), the "furtherance" requirement provides an important and substantive limit on the admissibility of hearsay statements. *United States v. Piper*, 298 F.3d 47, 54 (1st Cir. 2002). The "furtherance" requirement "is to be construed to protect the accused against the idle chatter of criminal partners and inadvertently misreported or deliberately fabricated evidence." 29A Am. Jur. 2d Evidence §856. Thus, "[m]ere chitchat, casual admissions of culpability, and other noise and static in the information stream are not admissible" under the exception. Hearsay Handbook 4th, 35:14; *See United States v. Martinez-Medina*, 279 F.3d 105, 117 (1st Cir. 2002); *United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980); *United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994); *United States v. Means*, 695 F.2d 811, 818 (5th Cir. 1983). In addition to the lack of evidence of conspiracy, because the statements failed to meet the furtherance requirement of Rule 5-803(a)(5), they should not have been admitted.

The evidence introduced clearly met the "in furtherance" requirement. The statement was made by Wright at about 5:00 p.m. on January 26, 2007, which was one hour and twenty minutes after Ms. Mesa's car left the storage facility where over $100,000 had been stolen from a unit to which Ms. Mesa had access. Butler and Wright, at that point, were in Ms. Mesa's car. Ms. Mesa's car was later moved from the garage at the "social house" (where Wright hid it), to Baltimore City where it was found with Ms. Mesa's corpse in the trunk. The State's unrebutted evidence showed that the car was removed from the garage sometime between January 26 and January 29, 2007, when the police found it in Baltimore City. The act of moving Ms. Mesa's car and body amounts to "fleeing, or disposing of the fruits and instrumentalities of crime." *State v. Rivenbark*, 311 Md. 147, 158 (1987). The statement by Wright that Horton should leave the social house because the declarant (Wright) and Butler were "up to something" clearly was not "idle chatter." To the contrary, a legitimate inference could be drawn by the jury that if Ms. Mesa had already been murdered by 5:00 p.m. on January 26, 2007, Wright and Butler still had to make arrangements to move Ms. Mesa's car and body so that neither could be connected to them, and that the coconspirators needed Horton to leave so that no one would witness their illegal activities. If Ms. Mesa had not been murdered when the remark was made, the jury could appropriately infer that the coconspirators needed privacy so that they could kill Ms. Mesa at a time and place where there would be no witnesses. The State therefore made a *prima facie* showing that Wright's statement was made in furtherance of the conspiracy.

For the above reasons, we hold that because the State met its burden (during its case-in-chief) of meeting the foundational requirements set forth in Md. Rule 5-803(a)(5), any error in allowing the hearsay statement into evidence too early was harmless beyond a reasonable doubt. In light of that holding, it is unnecessary for us to address the State's second alternative argument, which is that considering all the evidence of appellant's guilt, coupled with the vague and ambiguous nature of the statement at issue, allowing Horton to tell the jury that Wright said that he and appellant were "up to something" was harmless beyond a reasonable doubt.

B. Right of Confrontation

The appellant argues:

> [t]he trial court erroneously permitted the State to introduce testimonial statements of a non-testifying medical examiner [Dr. Greenberg] through the in-court testimony of a medical examiner [Dr. Shelly] who did not make the ultimate determination as to cause and manner of death where appellant had no opportunity to confront the non-testifying medical examiner.

The appellant's argument continues:

> On October 7, 2011, the parties discussed the State's intent to call Dr. Mark Shelly. The defense moved to exclude his testimony regarding the findings of Dr. Shelly's supervisor, Dr. Greenberg, the supervising medical examiner that ultimately made the conclusions and opinions made in the autopsy report.

As can be seen, the appellant maintains that the "error" committed by the trial judge was allowing Dr. Shelly to testify as to Dr. Greenberg's "conclusions and opinions" regarding "cause and manner" of Ms. Mesa's death.

Apparently, although he did not say so specifically in his brief, appellant contends that the court committed reversible error by overruling the motion *in limine* made prior to Dr. Shelly's testimony. Even if we were to assume, purely for the sake of argument, that it was error for the court to deny the motion *in limine*, which allowed Dr. Shelly to testify as to what appellant contends were Dr. Greenberg's "conclusions and opinions," that "error" could not possibly have prejudiced appellant because the autopsy report came into evidence without objection.

Maryland Rule 4-323(a) reads, in material part, as follows "[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." When State's Exhibit No. 39 was admitted, appellant's trial counsel not only failed to object, but affirmatively said that she had "no objection." Under such circumstances, the requirements of Md. Rule 4-323(a) were not met and, for appellate purposes, any objection to the contents of that report was waived.[7] As the Court of Appeals said in *Klauenberg v. State*, 355 Md. 528, 545 (1999) "[i]t is fundamental that a party opposing the admission of evidence must object at the time that evidence is offered."

[7]Although the matter is not outcome-determinative in this case, we note that when, as here, a motion *in limine* to exclude evidence is denied, counsel ordinarily must still object when the evidence is introduced in order to preserve the objection. *Klauenberg v. State*, 355 Md. 528, 540 (1999); *Lee v. State*, 193 Md. App. 45, 70 (2010). We also note that appellant never made a motion *in limine* to exclude the autopsy report.

When Dr. Shelly gave his opinion at trial regarding the cause and manner of death, that opinion was identical to what was said in the autopsy report, to which appellant's counsel made no timely objection. This is important because it is well-established that where "competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received." *Jones v. State*, 310 Md. 569, 589 (1987), sentence vacated on other grounds and remanded, 486 U.S. 1050, sentence *rev'd*, 314 Md. 111 (1988). *See also Clark v. State*, 97 Md. App. 381, 395 (1993).

Moreover, even if a timely objection to the autopsy report had been made and overruled, and even if appellant's counsel had unsuccessfully objected at trial to Dr. Shelly's cause and manner of death opinion, there still would have been no reversible error. As already pointed out, appellant argues that the trial judge erred by allowing Dr. Shelly to testify as to "testimonial statements" made by Dr. Greenberg. But, contrary to appellant's argument, Dr. Shelly never once testified about what Dr. Greenberg's opinion might have been. On direct examination Dr. Shelly testified, without objection, as to what <u>his</u> opinion was as to the cause and manner of death. The pertinent questions and answers were as follows:

> Q. Now, Dr. Shelly, to a reasonable degree of medical certainty what was the cause of death, the cause of death of Sintia Mesa?
>
> A. Asphyxia.
>
> Q. And to a reasonable degree of medical certainty what was the manner of death of Sintia Mesa?

A. Homicide.

Dr. Shelly later proceeded to explain, again without objection, his reasons for his opinion as to cause and manner of death. Notably, in his testimony, Dr. Shelly was not asked to, nor did he relate, anything about the opinion or finding of Dr. Greenberg or anyone else. Dr. Shelly gave his own opinion in regard to what he saw and what he concluded after performing the autopsy. And, although appellant argued otherwise in his motion *in limine*, as a medical doctor board certified in clinical pathology (since 2005) and in forensic pathology (since 2007) Dr. Shelly was quite obviously well-qualified to express an opinion as to the cause and manner of death.

The only objections to Dr. Shelly's testimony that were made when he testified before the jury, were objections to the introduction (and testimony about) photographs of Ms. Mesa's body that were taken at the time of the autopsy and the introduction of the notes Dr. Shelly made when he performed the autopsy. Appellant does not, however, contend in this appeal that the trial judge erred by overruling appellant's objections to the photographs or notes.

Aside from what has already been said, we hold that even if the objections that appellant now makes had been perfectly preserved for appellate review, appellant would not benefit. What appellant's argument boils down to is a contention that he was denied his right to confront Dr. Greenberg, a right appellant claims was recognized by the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004) and its progeny.

In *Malaska v. State*, 216 Md. App. 492 (2014), we said:

> Where, as here, there is no dispute that the statements being challenged on confrontation grounds were made "out-of-court," the relevant inquiry focuses on whether the statements were made by "an absent witness." *Derr* [*v. State*], 434 Md. [88] at 106-07, 73 A.3d 254 [(2013)]. To answer this question, we must first identify the declarant–or declarants, as the case may be–of the statements being challenged.

Id. at 511.

In this case, the only out-of-court statement in the autopsy report that appellant challenges on appeal is the opinion as to the manner and cause of Ms. Mesa's death. As to the challenged part of the autopsy report, Dr. Shelly was the declarant. After all, he testified: 1) that he wrote the original report; and 2) that there were no differences between the original and final report in regard to the conclusion as to the manner and cause of death. Thus, the out-of-court declarant was the same witness who testified and was subject to cross-examination. There was no "absent witness" within the meaning of *Crawford* and its progeny. The State, by introducing the autopsy report through Dr. Shelly, did not violate appellant's Sixth Amendment right to confront a witness called against him.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.