UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2017

September Term, 2012

DANTE L. BENNETT

v.

STATE OF MARYLAND

Woodward,
Wright,
*Eldridge, John C.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: March 23, 2015

*Eldridge, J., participated in the argument of this case but did not participate in the decision.

After a three-day jury trial in the Circuit Court for Howard County, appellant, Dante Bennett, was convicted of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, first degree assault, and theft of property valued over $1,000, all arising out of his involvement in an armed robbery of a gas station. The court sentenced appellant to fifteen years' incarceration for robbery with a dangerous weapon and fifteen years' incarceration for conspiracy to commit robbery with a dangerous weapon, to be served consecutively. The remaining convictions were merged for sentencing purposes.

On appeal, appellant raises four questions for our review, which we have rephrased:[1]

1. Did the trial court err in denying appellant's motion to suppress his statement to police?

2. Did the trial court err by admitting surveillance video and still images derived from the video of the gas station where the robbery took place?

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[1] Appellant's questions, as presented in his brief, are:

1. Was the failure to suppress Mr. Bennett's statement to police after he unequivocally invoked his constitutionally protected right to counsel reversible error?

2. Did the trial court err by admitting the gas station's surveillance video and still images derived from the video without proper authentication?

3. Did the trial court err by admitting testimony from Detective Ehart concerning descriptions of Eric Shird and the robbery suspects?

4. Was the purely circumstantial evidence presented at trial sufficient to convict Mr. Bennett of being an accomplice to armed robbery and conspiracy?

3. Did the trial court err by admitting testimony concerning a detective's description of the robbery suspects?

4. Was the evidence insufficient to convict appellant as a conspirator and accomplice to robbery with a dangerous weapon?

For the following reasons, we shall answer these questions in the negative and, accordingly, affirm the judgments of the circuit court.

BACKGROUND

On November 20, 2011, around 1:22 AM, two masked men armed with a shotgun entered the Normandy Crown gas station store located at 8505 Baltimore National Pike in Ellicott City, Maryland, and robbed Abdul Qureshi, the gas station attendant, at gunpoint. Appellant, who often played keno at the gas station, was in the gas station store at the time of the robbery. Minutes before the robbers arrived, appellant had asked Qureshi to leave the glass-enclosed protective booth to tell him the price of a soda. Qureshi was outside the protective booth when he was robbed. The subsequent investigation determined that appellant called one of the robbers, Eric Shird, several minutes before the robbery. Appellant, as viewed from the surveillance video of the store, walked out of the store during the robbery.

After the robbery, Qureshi called the police. A police officer and Detective Allison Ehart arrived at the crime scene and took statements from two witnesses and Qureshi. Detective Ehart also retrieved a disc ("DVD") containing video surveillance of the store.

On March 15, 2012, nearly four months later, appellant was arrested by Howard County Police and brought to the police station, where he was interviewed by Detectives Ehart and Lance Bergensen. Before beginning the interview, which was recorded by both video and audio, Detective Ehart advised appellant of his *Miranda* rights. Appellant acknowledged that he understood his rights and indicated that he was willing to answer questions. After answering the detectives' questions for approximately twenty minutes, appellant asked Detective Ehart: "[A]re you charging me [with] this? Do I need to call an attorney?" Detective Ehart responded: "You are being charged with an armed robbery. You were arrested on a warrant today yes." Appellant then stated: "Okay, okay, so I need to call an attorney," to which Detective Ehart said: "That's completely up to you, you can, you can continue talking to me or you can, you can contact your attorney." Thereafter, appellant continued to answer the detectives' questions for approximately two hours.

The circuit court held a hearing on July 6, 2012, on appellant's motion to suppress his statement to the police. The court denied the motion, concluding that the statement was voluntary and in compliance with the requirements of *Miranda*. On September 10, 2012, the court held a hearing on appellant's request to reconsider the denial of the motion to suppress, during which appellant raised for the first time the invocation of his right to counsel. After reviewing both the video and transcript of the March 15, 2012 interview and considering arguments of counsel, the court again denied the motion, determining that appellant's

statements "Do I need to call my lawyer?" and "Okay. So I need to call an attorney" were ambiguous "at best," and not an invocation of his right to counsel.

A jury trial was held from October 2 to 4, 2012. The State's theory of the case was that appellant assisted the two robbers by acting as their "eyes and ears" and luring Qureshi out from behind the protective glass enclosure. At trial, the State called eight witnesses: Qureshi; Officer Christopher Piper, one of the first officers to respond to the robbery on November 20, 2011; Majid Hussain, the owner of the gas station; Sohail Ahsam, Hussain's nephew and the manager of the gas station; Officer Andrew Schlosnagle, the officer who arrested appellant on March 15, 2012; Anthony Kelly, an employee at a nearby video store; Detective Clate Mouton-Jackson, who analyzed the two phones seized from appellant; and Detective Ehart.

At the close of the State's case-in-chief, the circuit court denied appellant's motion for judgment on the four counts against him. As stated earlier, the jury convicted appellant of robbery with a dangerous weapon; first degree assault; theft over $1,000; and conspiracy to commit robbery with a dangerous weapon. Appellant was sentenced to a total of thirty years' incarceration.

Additional facts will be set forth below to resolve the questions presented.

DISCUSSION

Suppression of Appellant's Statement to Police

Appellant argues that he unequivocally invoked his right to counsel during the interview, and that the trial court erred by failing to suppress the portion of appellant's interview following his statement, "Okay, okay, so I need to call an attorney." Appellant further contends that, even if the statement was equivocal, appellant's subsequent clarifying statements rendered the statement unequivocal.

The State responds that the circuit court correctly denied appellant's motion to suppress his statement. The State contends that a reasonable person in the officer's position would interpret appellant's statement as tied to his question about whether or not he was being charged, and not a request for an attorney to be present during interrogation. Further, the State argues, appellant's later statements that "he wanted an attorney to help explain his side of the story in court" and that he was "wasting his time even speaking" support the State's contention that appellant was asking for counsel to help him tell his story at trial, not during the interrogation.

In reviewing a trial court's ruling on a motion to suppress,

> we consider only those relevant facts produced at the suppression hearing that are most favorable to the State as the prevailing party on the motion. While we accept the factual findings of the trial court, unless those findings are clearly erroneous, we make our own independent constitutional appraisal as to whether an action was proper by reviewing the law and applying it to the facts of the case.

Wimbish v. State, 201 Md. App. 239, 249 (2011) (citations and internal quotation marks omitted), *cert. denied*, 424 Md. 293 (2012); *see also Rush v. State*, 403 Md. 68, 83 (2008) ("We review the evidence and the inferences that may be reasonably drawn in the light most favorable to the prevailing party.").

In *Edwards v. Arizona*, the Supreme Court held that law enforcement must immediately stop interrogating a suspect where the suspect has "clearly asserted his right to counsel." 451 U.S. 477, 485 (1981). In *Davis v. United States*, the Court addressed those situations where the suspect's invocation of his right to counsel is "insufficiently clear to invoke the *Edwards* prohibition on further questioning." 512 U.S. 452, 454 (1994). The Court explained:

> [T]he suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

Id. at 459 (internal citations omitted).

In *Ballard v. State*, the Court of Appeals reviewed *Edwards* and *Davis* to determine whether a suspect had unequivocally invoked his right to counsel. 420 Md. 480, 489-91 (2011). It was undisputed that Ballard had been advised of and validly waived his *Miranda* rights. *Id.* at 482. Midway through the interrogation, Ballard said: "You mind if I not say

no more and just talk to an attorney about this." *Id.* To determine whether Ballard unequivocally invoked his right to counsel, the Court compared his statement with that in *Davis*, 512 U.S. at 455 ("Maybe I should talk to a lawyer."); *Matthews v. State*, 106 Md. App. 725, 737 (1995) ("Where's my lawyer?"), *cert. denied*, 341 Md. 648 (1996); and *Minehan v. State*, 147 Md. App. 432, 444 ("Should I get a lawyer?"), *cert. denied*, 372 Md. 431 (2002). The Supreme Court in *Davis*, and this Court in *Matthews* and *Minehan*, determined that these statements were ambiguous.

In *Ballard*, the Court of Appeals distinguished the statement "You mind if I not say no more and just talk to an attorney about this," from the other three statements:

> None of the statements under consideration in those cases—"Where's my lawyer," "Maybe I should talk to a lawyer," or "Should I get a lawyer,"—provides any indication that the suspect, at the time the statement was uttered, actually desired to have a lawyer present for the remainder of the interrogation. When Matthews asked "Where's my lawyer?" a reasonable officer could and likely would infer either that Matthews was wondering about his lawyer's whereabouts or, perhaps, whether a lawyer had been provided for him. The questions "Maybe I should talk to a lawyer," and "Should I get a lawyer" suggest that the suspect *might* want a lawyer, which, under *Davis*, is insufficient to require the officer to cease questioning.

420 Md. at 492 (emphasis in original). Conversely, the Court explained, Ballard's statement, "even if understood to be phrased as a question, . . . transmit[s] the unambiguous and unequivocal message that he wanted an attorney," because the phrase "you mind if" was simply a colloquialism or an effort to be polite. *Id.* at 492-93. The Court concluded that,

when viewed objectively from the perspective of a reasonable police officer, Ballard's statement was an unambiguous expression of his desire to obtain an attorney. *Id.* at 493.

Furthermore, the Court noted that, even if a reasonable officer were to understand the statement as only that Ballard *might* have been invoking his right to counsel, his next statement verified that Ballard was in fact invoking his right to counsel. *Id*. at 494. Specifically, after Ballard said: "You mind if I not say no more and just talk to an attorney about this," the officer asked him: "What benefit is that going to have?" Ballard then stated: "I'd feel more comfortable with one." *Id*. The Court determined that the second statement, "I'd feel more comfortable with [a lawyer]," clarified any ambiguity that the first statement might have created. *Id.*

Three years after *Ballard*, this Court considered whether a suspect unambiguously invoked his right to counsel in *Malaska v. State*. 216 Md. App. 492, *cert. denied*, 439 Md. 696 (2014), *cert. denied*, 2015 WL 231993 (U.S. Jan. 20, 2015). In *Malaska*, after receiving and waiving his *Miranda* rights, Malaska stated, "maybe I need an attorney." *Id.* at 502. One of the officers questioning him responded, "only you can decide that." *Id.* at 527. Malaska said, "possibly I need an attorney." *Id.* The other officer stated, "we both know . . . what happened tonight." *Id.* Malaska said, "I'll explain what happened." *Id.* The officer replied, "if you want an attorney, no, no other questions will be asked of you." *Id.* Malaska responded, "No . . . I'd like to make, I'll make a statement," but "I think I need an attorney." *Id.* The officer asked him, "You want an attorney to talk to you before you, you answer any

questions?" *Id.* Malaska said, "I'll make a statement right now." *Id.* The officer asked, "You don't want an attorney?" *Id.* Malaska said, "I don't need an attorney yet." *Id.*

We noted that Malaska's statements that he "maybe" and "possibly" needed an attorney "are equivocal, and, thus, insufficient to invoke his right to counsel under *Davis* and *Ballard*." *Id.* at 529. After these equivocal statements, the officer asked Malaska if he wanted an attorney. *Id.* Malaska's conflicting answers provided little clarity. *Id.* We held that, "when an officer properly inquires into the intentions of a suspect and receives an answer with two directly conflicting sub-parts, it is proper, as was done here, for the interrogating officer to inquire further into the matter in order to clarify the suspect's intentions." *Id.* at 530. We concluded that Malaska's statements were not an unambiguous invocation of his right to counsel, and upheld the trial court's denial of Malaska's motion to suppress the statement. *Id.*

Therefore, where

> a suspect signs a valid waiver of his *Miranda* rights prior to the commencement of a police interrogation, the suspect must, thereafter, unambiguously request counsel in order to invoke his right to counsel. This means that the suspect's request must be a sufficiently clear articulation, such that a reasonable police officer in the circumstances of the interrogator would understand the statement to be a request for an attorney.

Id. at 526 (citations and internal quotation marks omitted). If the request for counsel is ambiguous, an officer may, but is not required to, further inquire in order to clarify whether the suspect is invoking his right to counsel. *See id.* at 530; *see also Davis*, 512 U.S. at 459

(stating that, "[i]f the statement fails to meet the requisite level of clarity, [the case law] does not require that the officers stop questioning the suspect").

In the instant case, it is undisputed that appellant was properly given his *Miranda* rights and then validly waived those rights. During the course of the interrogation, the following exchange took place:

[APPELLANT]:	Let me, let me ask you this first of all.
DETECTIVE EHART:	Sure.
[APPELLANT]:	Before we continue, I have nothing to hide **but um, are you charging me [with] this? Do I need to call an attorney?** I'm, I'm trying to figure out what's going on here because I had absolutely nothing to do with it. But I'm not going to sit here and go back and forth. I'll help you as much as I can like you said, you talked to [the owner of the gas station]. You didn't talk to me, maybe that's why I don't know, let me know what's going on here.
DETECTIVE EHART:	You are being charged with an armed robbery. You were arrested on a warrant today yes.
[APPELLANT]:	**Okay, okay, so I need to call an attorney.**
DETECTIVE EHART:	**That's completely up to you, you can, you can continue**

	talking to me or you can, you can contact your attorney and
[APPELLANT]:	**Okay, so no matter what I say here I'm being charged?**
DETECTIVE EHART:	**You have, the charges have already been filed.**
[APPELLANT]:	**Okay, well I need to speak to, um, call my wife or something 'cause this is crazy.** This is absolutely crazy, so I'm wasting my time even speaking, this is absolutely crazy.

(Emphasis added).

Appellant's first statement, "Do I need to call an attorney?" is very similar to the suspect's statement in *Davis*, "Maybe I should talk to a lawyer," 512 U.S. at 455, and in *Minehan*, "Should I get a lawyer?" 147 Md. App. at 444. Appellant's statement is not a request for an attorney; rather, it suggests that appellant *might* want an attorney. *See Ballard*, 420 Md. at 492. In *Davis*, the Supreme Court explained:

> We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes his right to counsel at any time, the police must immediately cease questioning him until an attorney is present. **But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.**

512 U.S. at 462 (emphasis added). Therefore, we conclude that appellant's first statement was insufficient to invoke his right to counsel.

Immediately following his first statement, appellant asked if he was being charged with a crime. When the detective replied that appellant was being charged with armed robbery, appellant made the second statement at issue: "Okay, okay, so I need to call an attorney." Interpreting that statement as a question, Detective Ehart answered: "That's completely up to you, you can, you can continue talking to me or you can, you can contact your attorney and [—]" Appellant then interrupted Detective Ehart to go back to the subject of the charges by stating that "so no matter what I say here I'm being charged?" Upon receiving an affirmative response from the detective, appellant said that he needed to talk to his wife, not his attorney.

The circuit court analyzed the second statement made by appellant in its oral opinion denying appellant's motion for reconsideration of the denial of his motion to suppress:

> I didn't interpret that as [an] unequivocal request to have an attorney before interrogation continued. At best it's ambiguous. I'm not even sure that we reached the point of ambiguity in it, because immediately upon that comment Detective Ehart says—advises him. You can keep talking or, you know, you can get an attorney. And then [appellant] immediately goes back to discussion about whether or not he's been charged. Okay. So no matter what I say, I'm being charged? And I didn't get the sense that this was a request for an attorney to be present during interrogation.

We agree with the circuit court's analysis. In the context of the conversation between appellant and Detective Ehart, appellant's second statement at issue was ambiguous. "Okay,

okay, so I need to call an attorney" could be a declaration or a question. As a reasonable police officer, Detective Ehart interpreted the statement as a question and sought clarification by advising appellant of his two options: to continue talking or to contact his attorney. Appellant replied by referring back to the charges and asked, in essence, whether there was any way that he could talk his way out of "being charged." When Detective Ehart answered that charges had already been filed against him, appellant stated that he needed to talk to his wife, not an attorney. Thus, as the circuit court opined, appellant's reference to the "need to call an attorney" was ambiguous, because it did not relate to a desire to stop speaking with the police until an attorney was present. Instead, appellant wanted an attorney's assistance to help him get out of being charged.

Finally, we reject appellant's argument that, if the second statement at issue was not clear initially, it became clear when he later said that he was "wasting [his] time even speaking," that speaking was "only going to do [him] justice in a court of law" and "my time [to give his side of the story] is in court." These statements directly support the State's contention that appellant asked for counsel not to assist him with the interrogation, but with explaining his side of the story at trial. Far from rendering his earlier statement a clear invocation of the right to counsel, these subsequent statements buttress the opposite conclusion.

In sum, because neither of appellant's statements were an unambiguous request for a lawyer, the detectives "were not required to stop questioning [the suspect], though it was

entirely proper for them to clarify whether [he] in fact wanted a lawyer." *Davis*, 512 U.S. at 462. Accordingly, the circuit court did not err in denying appellant's motion to suppress, nor in denying his motion to reconsider the denial of the motion to suppress.

Surveillance Video

Appellant next challenges the admission into evidence of the DVD containing a copy of video surveillance of the gas station on the night of the robbery. The State identified the DVD as State's Exhibit No. 11 during the testimony of Hussain, the owner of the gas station. When the State asked to move the DVD into evidence, appellant objected on the grounds of a lack of foundation. After hearing argument, the trial court allowed the DVD to be identified, but did not admit the DVD into evidence at that time. The State proffered to the court that later witnesses would provide additional foundation regarding the creation of the DVD.

Ahsam, the manager of the gas station, testified that there were nine cameras at the gas station, and that, when he arrived at the gas station on the night of the robbery, police officers were already looking at the surveillance video. Ahsam identified State's Exhibit No. 11 as the DVD containing a copy of the video surveillance from the night of the robbery. According to Ahsam, he assisted Detective Ehart in obtaining the video surveillance, but another police officer was the one who actually copied the video on to the DVD. The State did not ask to have the DVD admitted through Ahsam.

The State finally sought to admit the DVD through Detective Ehart. The State offered the DVD into evidence after eliciting additional foundation evidence from Detective Ehart:

[PROSECUTOR]:	Okay. Showing you what's already been marked as State's Exhibit No. 11, do you recognize what that is?
[DETECTIVE EHART]:	Yes.
[PROSECUTOR]:	And what is that?
[DETECTIVE EHART]:	It's a copy of the surveillance video from the gas station.
[PROSECUTOR]:	Okay. And have you had an opportunity to view that?
[DETECTIVE EHART]:	Yes.
[PROSECUTOR]:	And is, that video, is it from one camera or separate cameras?
[DETECTIVE EHART]:	It's from numerous cameras.
[PROSECUTOR]:	**And was that video or that copy of that video the same or substantially the same as what you watched when you were actually sitting in the little office at the gas station itself that night?**
[DETECTIVE EHART]:	**Yes.**
[PROSECUTOR]:	Your Honor, at this time the State would ask to move State's Exhibit No. 11 into evidence.

(Emphasis added).

Defense counsel then asked to *voir dire* the witness, and the court agreed. The following colloquy took place:

[DEFENSE COUNSEL]:	You looked—you've looked at that video since it was made; correct?
[DETECTIVE EHART]:	Yes.
[DEFENSE COUNSEL]:	**And verified that it looks like a copy of what you saw on the—at the store on the video?**
[DETECTIVE EHART]:	**Yes.**
[DEFENSE COUNSEL]:	But, there were nine cameras, I think, at that store?
[DETECTIVE EHART]:	I'm not exactly sure how many cameras there were.
[DEFENSE COUNSEL]:	That video doesn't contain every camera[']s video for that timeframe, does it?
[DETECTIVE EHART]:	I don't recall.
[DEFENSE COUNSEL]:	Did you make the decision what to download from the video to that disc?
[DETECTIVE EHART]:	**I gave the timeframe to the manager and asked them to have their technician download that timeframe for me**—
[DEFENSE COUNSEL]:	And what was—

[DETECTIVE EHART]:	**—of the different cameras. Now, some of the cameras are—they're motion activated, so some of them don't record unless they're motion activated. So, if there was nine cameras and only six of 'em activated then I might have gotten six cameras, but I asked for a certain timeframe.**
[DEFENSE COUNSEL]:	Okay. And what was the timeframe you asked for?
[DETECTIVE EHART]:	During the timeframe of the robbery, probably—I don't exactly know, but **I asked for the timeframe of maybe 20 minutes before.**
[DEFENSE COUNSEL]:	Thank you.
[PROSECUTOR]:	Your Honor, at this time the State would ask to move State's Exhibit No. 11 into evidence.

(Emphasis added).

The court then admitted the DVD into evidence without objection by appellant. After additional testimony, portions of the DVD were played for the jury. Appellant again did not object. Later in her testimony, Detective Ehart identified and the State asked to admit still photographs taken from the DVD. Defense counsel said, "I'm not going to object to the still photographs that are State's Exhibits 21 through 26."

Appellant argues in this appeal that the trial court erred by admitting the DVD and still images derived therefrom. Appellant contends that neither the DVD nor the still images were properly identified, because the State did not adduce testimony from the person who transferred the video from the surveillance system to the DVD, nor evidence regarding the reliability of the surveillance system. Further, appellant asserts, the time gaps in the DVD raise questions as to the reliability of the video recording.

The State responds that the issue of the admissibility of the DVD and the still photographs taken therefrom is not preserved for our review, because appellant did not object to their admission. Further, the State argues that appellant is not entitled to plain error review, because appellant affirmatively waived his claim of error, rather than simply forfeiting his objection. We agree with the State.

Rule 4-323 requires that "[a]n objection to the admission of evidence [ ] be made at the time the evidence is offered or as soon thereafter as the grounds for objection becomes apparent. Otherwise, the objection is waived." This requirement "enables the trial court to attempt to cure any error, which helps to avoid unnecessary appeals." *State v. Jones*, 138 Md. App. 178, 218 (2001), *affirmed*, 379 Md. 704 (2004). Moreover, "to preserve an objection, a party must either object each time a question concerning the matter is posed or . . . request a continuing objection to the entire line of questioning." *Wimbish*, 201 Md. App. at 261 (internal citations and quotation marks omitted); *see also Ware v. State*, 170 Md.

App. 1, 19 ("[O]bjections must be reasserted unless an objection is made to a continuing line of questions."), *cert. denied*, 396 Md. 13 (2006), *cert. denied*, 549 U.S. 1342 (2007).

In the instant case, appellant initially objected to the admission of the DVD on foundation grounds. The trial court agreed, and withheld admitting the DVD until the State provided additional evidence regarding its creation. Upon the State's second request to admit the DVD, appellant did not object, nor did he object when portions of the DVD were played for the jury. Also, when the State offered into evidence the still photos taken from the DVD, defense counsel affirmatively stated that she did not object to the admission of the photographs. Therefore, we conclude that appellant has not preserved for appellate review his claim of error regarding the admission of the DVD and the still photographs taken from the DVD.

Appellant, however, has asked us to conduct plain error review. We decline to do so for two reasons. First, appellant is not entitled to plain error review, because he affirmatively waived his objection. Second, even if there was no waiver, we decline to exercise our discretion to conduct plain error review under the circumstances of this case. We shall explain.

The Court of Appeals has identified a four-step analysis for a request for plain error review:

> First, **there must be an error or defect**—some sort of "[d]eviation from a legal rule"—**that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant**. Second, the legal error must be clear or obvious, rather than subject to

> reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it "affected the outcome of the [ ] court proceedings." Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error "'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Meeting all four prongs is difficult, "as it should be."

Rich, 415 Md. at 578 (emphasis added) (quoting *Puckett v. United States*, 556 U.S. 129 (2009)). The appellate court's "prerogative to review an unpreserved claim of error . . . is to be rarely exercised and only when doing so furthers, rather than undermines, the purposes of the rule." *Robinson v. State*, 410 Md. 91, 104 (2009).

As we noted in *Carroll v. State*,

> the Court of Appeals has discussed the interplay between waiver and plain error review, and it has made clear that issues that a party has affirmatively waived are not subject to plain error review. The Court explained the difference between forfeiture, which is "the failure to make a timely assertion of a right," and waiver, which is the "intentional relinquishment or abandonment of a known right."

202 Md. App. 487, 509 (2011) (quoting *Rich*, 415 Md. at 578-80), *aff'd*, 428 Md. 679 (2012). The Court of Appeals has held that "[f]orfeited rights are reviewable for plain error, while waived rights are not." *Rich*, 415 Md. at 580.

In the instant case, appellant sought and received the opportunity to *voir dire* Detective Ehart on the specific issue of the DVD's authenticity, and when the State offered the DVD into evidence immediately after that examination, appellant did not object. This sequence of events supports the conclusion that appellant attempted to adduce evidence

supporting an objection to the authenticity of the DVD, and having found none, consciously chose not to object. Therefore, we hold that appellant affirmatively waived any objection to the authenticity of the DVD, and thus such objection is not subject to plain error review.

Plain error review is also not available for the still photographs taken from the DVD. Defense counsel expressly stated that she did not object to the admission of the still photographs. An express statement of "no objection" to the admission of evidence is an affirmative waiver of that objection. *See Martelly v. State*, 230 Md. 341, 345 (1963) (concluding that the admissibility of disputed evidence was waived, because "[t]his is not a case where an accused simply failed to object to allegedly inadmissible evidence, but is one where counsel for the accused specifically stated, repeatedly, that he had no objection to its introduction"); *see also Booth v. State*, 327 Md. 142, 180 (declining to apply plain error review where "there is more [ ] than the simple lack of an objection to the instruction as given. Here defense counsel affirmatively advised the court that there was no objection to the instruction which the court immediately thereafter gave to the jury. Error, if any, has been waived"), *cert. denied*, 506 U.S. 988 (1992).

Finally, even if plain error review was available to appellant, we see no basis for the exercise of our discretion to conduct plain error review. We question whether there was any "error or defect" in the admission of the DVD and the still photographs derived therefrom. Appellant's primary contention is the lack of "testimony from the person that [sic] transferred the video from the surveillance system to [the DVD]." Such testimony was not necessary,

because Detective Ehart testified that the DVD was "the same or substantially the same as what [she] watched when [she was] actually sitting in the little office at the gas station itself" on the night of the robbery. Appellant's challenge to the DVD's reliability and completeness because of "time gaps" was addressed by Detective Ehart when she testified that some of the surveillance cameras were "motion activated." Thus a time gap would appear when no motion was detected. In any event, whatever error may have occurred in the admission of the DVD and still photographs did not, in our view, "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." *Rich*, 415 Md. at 578 (citations and internal quotation marks omitted).

Description of Eric Shird and the Robbery Suspects

During trial, appellant moved *in limine* to limit the evidence that the State could offer regarding Eric Shird, one of the alleged robbers. The State proffered that Detective Ehart would testify that phone records showed that appellant called Shird nineteen times between 12:45 AM and 1:55 PM on the night of the robbery, and that appellant was not on the phone with his girlfriend during the robbery, as appellant had said in his statement to police. Additionally, Detective Ehart would testify that she knew Shird because of her employment as an officer with the Robbery Unit.

In his argument to the trial court, appellant conceded that the phone records and subscriber information were admissible. Appellant argued, however, that any testimony from Detective Ehart that she was familiar with Eric Shird because of her criminal investigations

was inadmissible, because it was (1) hearsay, (2) more prejudicial than probative, (3) character evidence, and (4) in violation of the Confrontation Clause. Appellant concluded that evidence of Shird's reputation was "very clearly an attempt to bring in bad character evidence of [ ] Shird without him being a witness."

After initially reserving its ruling on appellant's motion, the trial court agreed with appellant that for Detective Ehart to tell the jury that she knew Shird because she worked in the robbery unit was "sort of a guilt by association propensity argument." The court granted the motion *in limine* "in terms of just saying that [Detective Ehart] know[s] him and [she] know[s] him because anybody who works in the robbery unit would." The State then asked the court if the State could ask Detective Ehart about Shird's race and date of birth. The court agreed, but went on to direct the State that

> anything that suggests that once [Detective Ehart] saw hi[s] name on the phone records that she knew him to be a person . . . who has a tendency towards armed robbery or something of that effect would not be allowed. But, to say that she subsequent to finding his name in the phone records checked his name and date of birth and address or something like that, that would be fine.

Appellant did not object to the court's ruling on the *in limine* motion.

At trial, the following colloquy occurred:

> [PROSECUTOR]: Detective Ehart, I'm going to show you this document which is already in evidence, 36. Have you seen that before?
>
> [DETECTIVE EHART]: Yes.

[PROSECUTOR]:	And that's the subscriber info for that telephone number that was being dialed or calling [appellant's] phone at 1:21?
[DETECTIVE EHART]:	Yes.
[PROSECUTOR]:	And who did that subscriber information come back to?
[DETECTIVE EHART]:	Mr. Eric Shird.
[PROSECUTOR]:	[A]nd what address was provided for Mr. Shird?
[DETECTIVE EHART]:	4530 Parkton Street, Baltimore, Maryland 21229.
[PROSECUTOR]:	And once you learned the name of Mr. Shird, did you have an opportunity to look into his biographical information and by that I mean date of birth, height and all that sort of thing?
[DETECTIVE EHART]:	Yes.
[PROSECUTOR]:	And what did you learn about Mr. Shird?
[DETECTIVE EHART]:	Mr. Shird is a 19 year old black male, date of birth November 16th[] of 1992. He's 5 '11" 145, weighs 145 pounds.

Appellant did not object to this testimony.

On appeal, appellant argues that the trial court erred by admitting Detective Ehart's description of Shird. According to appellant, because the description of Shird came from a

law enforcement database containing biographical information on criminal suspects, and not from Detective Ehart's own personal knowledge, the statement is inadmissible hearsay.

The State counters that this issue is not preserved for appellate review, because appellant did not object to the admission of Shird's biographical information during the motion *in limine* hearing or at trial. The State also argues that appellant is not entitled to plain error review, "because defense counsel received all the relief she wished for in making the motion *in limine*, and trial tactics are not a proper basis for plain error."

We agree that the issue of Detective Ehart's description of Shird is not preserved for our review. Appellant did not object to the admission of Shird's biographical information when it was discussed and ruled upon during the hearing on the motion *in limine*. Even if he had objected then, appellant would have had to object again at trial. *See Cure v. State*, 195 Md. App. 557, 570 (2010) ("To be sure, when a party seeks a trial court's ruling on a motion *in limine*, the party must object to the admission of the evidence at the time it is actually offered at trial, in order to preserve the objection."). Appellant did not do so.

Furthermore, we decline to engage in plain error review, because we do not believe that appellant was denied a fair trial. The purpose of appellant's motion *in limine* was to exclude evidence that Detective Ehart knew Shird through her work in the Robbery Unit, as well as Shird's "criminal history, or [ ] pending charges, or suspicions about [Shird's] conduct in other cases or in this case." By granting appellant's motion, the trial court granted, in effect, all of the relief requested by appellant. We thus conclude that the "rare,

rare phenomenon" of plain error review is not appropriate here. *Yates v. State*, 202 Md. App. 700, 721 (2011) (citations and internal quotation marks omitted), *aff'd*, 429 Md. 112 (2012).

Appellant also argues that the trial court erred by admitting Detective Ehart's descriptions of the armed robbers, because they were based on descriptions given to her by Qureshi, who witnessed the robbery, and other officers, and thus constituted hearsay. The State responds that any error in admitting the descriptions was harmless because the jury viewed the DVD, which depicted the robbers as described by Qureshi.

Directly following Detective Ehart's testimony describing Shird, the following colloquy took place:

[PROSECUTOR]:	Detective Ehart, in your investigation of the robbery, do you recall the suspect descriptions you were given of the armed robbers?
[DETECTIVE EHART]:	Yes.
[DEFENSE COUNSEL]:	Objection Your Honor. May we approach?
THE COURT:	No, overruled.
[DEFENSE COUNSEL]:	Calls for hearsay.
THE COURT:	I understand, overruled.
[PROSECUTOR]:	Detective Ehart, if you could please tell the Ladies and Gentlemen of the jury the descriptions you were given of the

	two armed robbers from the combat station? (sounds like)
[DETECTIVE EHART]:	Young black males, approximately 20 to 25 years of age, slender build.

We agree that the descriptions of the robbers were hearsay. We conclude, however, that any error in admitting the testimony was harmless, because the same evidence was admitted through the DVD. *See Peisner v. State*, 236 Md. 137, 145 (1964) (holding that any error "was rendered harmless by the introduction of competent evidence proving the same facts"), *cert. denied*, 379 U.S. 1001 (1965). In the instant case, the jury viewed the DVD, which depicted the same images of the robbers that the witnesses saw. Furthermore, Detective Ehart viewed the video surveillance as well, enabling her to confirm for herself that the descriptions of the robbers given by the witnesses were accurate. Accordingly, there was no reversible error in the admission of the descriptions of the robbers.

Sufficiency of the Evidence

Finally, appellant argues that the evidence produced by the State at trial was insufficient to support his convictions for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon According to appellant, the State relied on "tenuous and unreliable circumstantial evidence," including evidence that should not have been admitted at trial, such as the DVD of the robbery and the descriptions of Eric Shird and the robbers. Appellant asserts again that the DVD was not properly authenticated, and that the inaccurate time stamps on the DVD "raise[] doubts about the entire timeline and the

temporal connection between [appellant] and the actual robbers." Appellant also contends that the State did not adduce any evidence that appellant entered into an agreement to commit robbery with a dangerous weapon, or that appellant knew that a gun would be used.

The State counters that appellant's issue regarding his criminal conspiracy conviction is not preserved for appellate review, because he did not make a sufficiently particular argument when he made a motion for judgment of acquittal at the close of the State's evidence, nor when he renewed such motion at the close of all the evidence. We agree.

Defense counsel's only sufficiency argument regarding the conspiracy conviction consisted of the statement: "I not only feel that the evidence is not sufficient to show that there's been a conspiracy here . . . ."[2] Defense counsel did not articulate any reasons for this position. "When no reasons are given in support of the acquittal motion, this Court has nothing to review." *Taylor v. State*, 175 Md. App. 153, 159-60, *cert. denied*, 401 Md. 174 (2007); *see Byrd v. State*, 140 Md. App. 488, 494 (2001) (stating that the legal sufficiency of the evidence was not preserved for appellate review, because "[d]efense counsel merely asserted that the evidence was insufficient to send the case to the jury"). Therefore, appellant's claim of insufficiency of the evidence for the conspiracy conviction is not preserved.

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[2] The remainder of defense counsel's sentence was "but I think that it should be allowed to go [to] the jury if armed robbery goes to the jury," which is not relevant to our analysis of appellant's sufficiency argument on the conspiracy charge.

With respect to appellant's armed robbery conviction, the State points to the DVD, the phone records, and appellant's statements that are inconsistent with what is shown on the DVD as sufficient evidence that appellant was an accomplice to armed robbery. The State also asserts that any alleged unreliability of the evidence, as argued by appellant, goes to the "persuasive value of the prosecution's case, not its legal sufficiency."

When this Court is asked to review a claim of insufficiency of evidence, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Smith*, 374 Md. 527, 533 (2003). "[O]ur concern is not with whether the trial court's verdict is in accord with the weight of the evidence, but only with whether the verdict was supported by sufficient evidence—evidence which could fairly convince a rational trier of fact of the defendant's guilt beyond a reasonable doubt." *State v. Pagotto*, 361 Md. 528, 534 (2000) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), and *State v. Albrecht*, 336 Md. 475, 479 (1994)). Furthermore, we "give due regard to the [fact finder's] finding of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses." *Moye v. State*, 369 Md. 2, 12 (2002) (alteration in original) (citations and internal quotation marks omitted). Moreover, a conviction is not less valid because it is based on circumstantial evidence. *See Smith*, 374 Md. at 534 (noting that an appellate court does not retry the case, but rather determines "whether the verdict was supported by sufficient evidence, direct or circumstantial, which

could convince a rational trier of fact of the defendant's guilt of the offenses charged beyond a reasonable doubt" (citations and internal quotation marks omitted)).

Viewing the evidence in the instant case in the light most favorable to the State, we conclude that there is legally sufficient evidence to sustain appellant's conviction as an accomplice to armed robbery. We shall explain.

Qureshi testified that he was the only cashier on duty on the night of November 19 to November 20, 2011, and that he usually avoids leaving the glass-enclosed booth for safety reasons. According to Qureshi, appellant came into the store and asked him about the price of the sodas, but the price of the soda was visible on the soda bottle. Qureshi told appellant the price of the soda, but appellant asked again and said "no, I need your help, you come and help me." Detective Ehart also testified that the price of the soda was visible on the soda. When Qureshi left the booth to assist appellant, two masked men entered the store and pointed a shotgun at Qureshi, taking money and cigarettes from the store. Although appellant had been a regular customer before the robbery, Qureshi testified that he did not see appellant at the gas station again after the night of the robbery.

Detective Ehart also testified that after appellant claimed he was calling his girlfriend during the robbery, she had appellant's phone records analyzed, and his girlfriend's phone number did not appear in his phone records during the time of the robbery. Further, the phone records showed that appellant called Shird multiple times in the minutes before and after the robbery took place.

The video surveillance of the robbery contradicted appellant's insistence in his statement to the police that he was at the counter when the robbery took place. Indeed, the DVD shows that the two robbers did not even look at the protective booth when they entered the store; they immediately ran to the back of the store and accosted the clerk, as if they knew that the clerk would be in the back, outside of the booth. Finally, the DVD shows appellant with his cell phone watching the robbery occur, putting down the sodas in his hand, and walking out of the store.

Further, appellant's challenge to the "reliability" of the evidence, such as the conflicting time stamps, goes to the weight of the evidence, rather than to its sufficiency. "[I]t is not the function of the appellate court to determine the credibility of witnesses or the weight of the evidence. Rather, it is the jury's task to resolve any conflicts in the evidence and assess the credibility of witnesses." *Owens v. State*, 170 Md. App. 35, 101-02 (2006) (citations omitted), *aff'd*, 399 Md. 388 (2007), *cert. denied*, 552 U.S. 1144 (2008). Appellant had the opportunity at trial, and indeed took full advantage of that opportunity, to question witnesses about the time stamps and the various camera angles in the DVD, and to make arguments to the jury about the weight to afford that evidence.

Therefore, we conclude that the cell phone records, the DVD, and the testimony at trial constitute sufficient evidence from which a fact finder could find that appellant was guilty beyond a reasonable doubt of armed robbery as an accomplice.

JUDGMENTS OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; APPELLANT TO PAY COSTS.