UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2122

September Term, 2015

JAMOR TYRONE BURKS

v.

STATE OF MARYLAND

Meredith,
Leahy,
Albright, Anne K.
(Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: September 20, 2016

Following a three-day trial before a jury in the Circuit Court for Cecil County, Jamor Burks, appellant, was convicted of various drug and conspiracy offenses. Burks was sentenced to a total of sixty years' incarceration. In this appeal, he contends that the trial court erred in: 1) denying his pretrial motion to suppress the videotaped recording of his interview by police officers following his arrest; 2) denying his motion for judgment of acquittal on two conspiracy charges; and 3) failing to vacate one of his conspiracy convictions on the grounds of multiplicity.[1]

Because we perceive no reversible error, we will affirm.

FACTS AND PROCEDURAL HISTORY

The evidence at trial revealed the following. For several months in late 2014 and early 2015, Burks was the target of an investigation by the Maryland State Police ("State Police") and the FBI into drug trafficking in Cecil County. The principal geographic focus

[1] In his Brief, appellant presented the following questions for our review:

> 1. Did the trial court err in denying the defense motion to suppress a videotaped confession where the State failed to offer any evidence to specifically rebut Appellant's allegation that the police induced him to confess by promising that "anything" Appellant said could only "help" him and could not "hurt" him?
>
> 2. Did the trial court err in denying Appellant's motion for judgment of acquittal on his two conspiracy convictions where the record contained no evidence of advance planning, meeting of the minds, or prior agreement between the alleged co-conspirators?
>
> 3. Did the trial court err by failing to vacate one of Appellant's two conspiracy convictions where the evidence at most proved one continuous conspiratorial relationship, such that Appellant's convictions on both counts were multiplicitous in violation of the Double Jeopardy Clause?

of the investigation was the Winding Brook neighborhood in Elkton. The investigation was overseen by members of the State Police's Gang Enforcement Unit, including Corporal Sean Harris and Corporal Joshua Justice. Cpl. Harris testified that, over a three to four week period, he conducted "easily" eight to ten hours of on-the-ground surveillance in the Winding Brook neighborhood, during which he observed "Mr. Burks waving cars into Willow Court and sometimes Willow Drive. Mr. Burks would walk up to the vehicles, be that the driver's side or the passenger's side, stay there for just a few seconds, and then walk away."

As the investigation continued, Cpl. Harris enlisted the participation of Master Trooper Neil Miranda, a 19-year State Police veteran assigned to the Drug Enforcement Division. Tpr. Miranda was working as an undercover officer in Harford County when he was asked to assist with Cpl. Harris's investigation of Burks in Cecil County. Tpr. Miranda was introduced to Burks by a confidential informant, who furnished Tpr. Miranda with Burks's phone number.

On December 17, 2014, Tpr. Miranda sent a "text message" to Burks, inquiring about the availability of "two sticks" of heroin. As he explained to the jury: "The word [']stick['] is common terminology for also a log or ten bundles of heroin. A bundle of heroin is 13 individual packets of heroin." "Two sticks" of heroin would be 260 individual packets of the drug. Burks responded to Tpr. Miranda's text via a phone call from a different number; Burks asked Tpr. Miranda to meet him in a section of the Winding Brook neighborhood known as "the cut" or "the trap."

At trial, Tpr. Miranda gave the following testimony about his December 17, 2014, encounter with Burks:

[BY THE STATE]: Okay. So [the trap is] where he told you to go?

[BY TPR. MIRANDA]: Yes, ma'am.

Q. Did you in fact go to that place?

A. I did.

Q. What happened when you got there?

A. I observed Mr. Burks in the area and he stepped up to my vehicle and entered the front passenger seat.

Q. And what happened when he got into the front passenger seat?

A. At that point he handed me an amount of suspected heroin. In return I handed him $700 in currency. And taking a look at the amount, it was the two sticks or the two logs that I had requested from a previous conversation.

Q. Did you have any additional conversation with him that day?

A. No, ma'am. It was very little. Very little conversation, other than the fact that during that small window of maybe 30 seconds or so, I asked him [if] the next time that I came up to meet him for heroin, if I could, quote, double it up. I referred to double it up as in I requested the two sticks of heroin at that time, to double it up would be four sticks of heroin.

Q. And you meant for the next time?

A. For the next time.

Q. What was the defendant's response to you saying, ["]How about I double it up["]?

A. He advised that, no problem, to just let him know.

Tpr. Miranda testified that he had covertly recorded the audio and video of the entire December 17, 2014, transaction with Burks. The recording was admitted in evidence and played for the jury. Tpr. Miranda also testified that, once he made the buy, he went to a prearranged location and turned the contraband over to Cpl. Harris. Subsequent testing established that the substance Burks had sold Tpr. Miranda on December 17, 2014, was twenty bundles of heroin. The heroin had been packaged in fourteen bundles stamped "Aqua," and six bundles stamped "Itchy."

Tpr. Miranda testified that the same pattern of interaction with Burks was repeated four times over the next few months: Tpr. Miranda would contact Burks and inquire about buying heroin, and, in response, the trooper would be directed to meet Burks in the Winding Brook neighborhood. The State alleged that heroin sales were made by Burks on the following five dates: December 17, 2014; December 22, 2014; January 11, 2015; February 18, 2015; and March 3, 2015.

Tpr. Miranda testified that he texted Burks on December 22, 2014, and asked him if "he was good," which, Tpr. Miranda explained, is lingo "commonly used in drug transactions between dealers and users to refer to if the dealer is good or has drugs to be sold." Burks responded in the affirmative, and called Tpr. Miranda. When Burks called, Tpr. Miranda asked if Burks could sell him four sticks of heroin on special terms; Tpr. Miranda asked to pay for three and asked Burks to "front" the fourth. Burks told Tpr. Miranda that he had only three and a half sticks, but agreed that he would "front" the half stick. Tpr. Miranda then drove to the meeting place in the Winding Brook neighborhood -

- "the cut" or "the trap" --- and parked the 2004 Mercedes he was driving. He noticed nearby a dark-colored SUV, with the engine running and two occupants inside. Another passenger vehicle with two occupants pulled up a few parking spaces away from Tpr. Miranda. Shortly thereafter, yet another vehicle, a gold Chevrolet Tahoe, parked behind Tpr. Miranda's Mercedes. Tpr. Miranda testified about the December 22, 2014, transaction:

> There was an African-American male who had come out from the area of the 300 block of Willow Drive. He was about 20 years old. He had an Afro style haircut. He walked over and he stepped up to my driver's window and leaned in and gave me a --- leaned into my vehicle and gave me suspected heroin. The amount was three sticks of heroin, which is the ten bundles per stick.
>
> Then at that point the same subject walked back to the gold Chevy Tahoe and from there he --- and this is referring to my notes. It's back and forth. So I'm not reading from my notes but just referring to which vehicles he went to next.
>
> He then went over to the SUV that I had originally saw was parked already there prior to my arrival, leaned into the vehicle. It looked to me based on my training, knowledge and experience to be a hand-to-hand drug transaction.
>
> [BY DEFENSE COUNSEL]: Objection.
>
> [BY THE COURT]: I'll allow the testimony. Go ahead.
>
> [BY THE STATE]: And, Trooper, you can say specifically what you saw him do.
>
> [BY THE WITNESS]: Okay. He leaned in just as he did in my vehicle when he handed me the suspected heroin. He walked over to, like I said, the SUV, leaned in. And to my point, you know, he did the exact same thing in my vehicle, which led me to believe that that was a hand-to-hand drug transaction between the driver of the SUV and the unknown male that walked up to my vehicle.

[BY DEFENSE COUNSEL]: Objection. Move to strike.

[BY THE COURT]: Overruled. Go ahead.

[BY THE WITNESS]: He then returned to the gold Tahoe that we knew through the investigation to be associated with [Burks] and then returned again to my window, advised that he didn't realize I hadn't paid for the substance ---

[BY DEFENSE COUNSEL]: Objection. Hearsay.

[BY THE COURT]: I'll allow the statement. Go ahead.

[THE WITNESS]: And that ---

[BY THE STATE]: Had you in fact paid?

[THE WITNESS]: I did not, no.

At that point I did question him, that subject, if the heroin came from Q, because I had never dealt with anybody except for [Burks]. And through the investigation, . . . I knew [Burks] as Q, as a street name as Q. I asked that subject if it was from Q and if the –

[BY DEFENSE COUNSEL]: Objection.

[BY THE COURT]: Sustained.

[BY THE STATE]: Your Honor, that's what he said, what the witness said.

[THE COURT]: I think [defense counsel] is objecting to anything that the individual said.

[THE STATE]: That's fine, but what he just indicated is what he himself said.

[THE COURT]: What he said is fine.

[THE STATE]: You can say what you said.

> [THE WITNESS]: What I had said was, I asked if the heroin was, or the substance I was buying came from Q and if the money that I was going to hand this subject is going to Q.
>
> [THE STATE]: And what, if anything, did he do?
>
> [THE WITNESS]: And at that point I did hand the subject $1,050, and at that time he took the money at my window and returned to the gold Tahoe.

Tpr. Miranda testified that his next transaction with Burks took place on January 11, 2015. Tpr. Miranda had arranged, via text and phone conversations, to meet Burks in the Winding Brook neighborhood, and pay $1,600 for five "sticks" of heroin. Tpr. Miranda testified that he went to their usual meeting spot at the pre-arranged time, and described what happened on that occasion:

> [BY THE WITNESS]: After I parked there, within moments an older African American male stepped up to my car. He exited out of, referring to my notes, it was a black Chevy Tahoe that I noticed was parked several spaces to my right. He stepped out, it appeared to me he stepped out of the passenger side of that vehicle, came around the back of the vehicle, approached my passenger side window and told me to pull further to the back of the court, which in that ["]Y["] would be to the right. I backed out of the spot I was in and then pulled around to the right of the Y. [2]
>
> * * *
>
> I waited a couple minutes and then, referring to my report, the black Tahoe pulled to my driver's side of the vehicle. I had pulled into the spot, and then he pulled on my --- the Tahoe pulled out of his spot, came around, basically followed me around and parked on my driver's side of my vehicle.
>
> * * *
>
> I was able to notice the driver, I identified him as the defendant[,] seated with counsel, Jam[o]r Burks. He stepped out of the vehicle, referring to my report,

[2] The witness had earlier pointed out, on a map of the neighborhood, that "the bottom of the court . . . it's kind of a Y when you enter Willow Court."

> he was wearing a dark camouflage hoodie and blue jeans. I noticed that he reached into his center sweatshirt pocket and then retrieved a package, it was wrapped in white paper in a stick, in a log, and which I believed to be suspected heroin that I had arranged to purchase from him. He gave the package to me, and in return I gave him the $1,600 that we had agreed upon for the price.

Tpr. Miranda recorded the audio and video of this transaction; the recording was admitted as State's Exhibit 15, and played for the jury.

Tpr. Miranda testified about another meeting with Burks that took place on February 18, 2015. This meeting had been arranged via text messages exchanged over several days (January 27, 2015; February 9, 2015; February 10, 2015; and February 18, 2015) in which Tpr. Miranda requested three "sticks" of heroin (which would have included 30 bundles or 390 individual heroin packets). Tpr. Miranda explained to the jury that he went to Willow Court on February 18, 2015, and the following transpired:

> [BY THE WITNESS]: I pulled onto Willow Court and, looking at my notes, the blue Chevy Suburban which was associated with [Burks] and this investigation was parked in a similar location where it was the previous time and at the bottom of Willow Court. I passed that, I passed the vehicle, I noticed that it was running, and I pulled to the back of the, again, to the right hand side of the Y, like I had done the previous transaction, and parked and waited for [Burks] to come up.
>
> * * *
>
> The vehicle pulled around. I was able to identify the driver as [Burks], seated with counsel standing, and at that point he came over to my passenger side window, opened up the door, leaned inside and handed me like a grocery-style, like a brown grocery-style plastic bag, which I believed contained the amount of heroin, suspected heroin, that I was arranged to purchase, which in this one was the three sticks or three logs.

Tpr. Miranda recorded the audio and video of the February 18, 2015, transaction; the recording was admitted as State's Exhibit 17, and played for the jury.

The final transaction described by Tpr. Miranda occurred on March 3, 2015. Prior to that meeting, Tpr. Miranda asked Burks via text messages whether Burks would be willing to give Tpr. Miranda a discount on the price for a large quantity of heroin. It was ultimately agreed that Tpr. Miranda would buy ten "sticks" of heroin for $3,100, a discount from Burks's usual price of $350 per stick. Screenshots of those text messages were admitted into evidence as State's Exhibit 11.

As he had previously done, Tpr. Miranda went to the usual meeting spot in the Winding Brook neighborhood on March 3, 2015. He testified about his encounter with Burks on that occasion:

> [BY THE STATE]: Okay. What happened when you got to the trap?
>
> [BY THE WITNESS]: Referring to my report, the blue Chevrolet Suburban pulled behind me, I had parked head in at the trap location, and the blue Chevy Suburban that I was familiar with from previous transactions pulled in behind me and I guess double parked behind my vehicle. I did notice that the driver of the vehicle was [Burks], seated with counsel standing. At that time . . . [Burks] motioned for me to exit my vehicle and enter the back seat of his Suburban.
>
> Q. Is that the first time you had ever been asked to get into his vehicle?
>
> A. Yes, ma'am.
>
> Q. Basically the way he was parked, would you have been able to leave the area?
>
> A. No. Because he was double parked basically behind me. There was very little space between me being able to or would be able to back up and to get out of the spot.

Q. Did you, in fact, go to his vehicle?

A. I did, yes, ma'am.

Q. What did you see when you got there?

A. When I got in the vehicle there was one younger African American male sitting in the passenger seat, and then [Burks] was seated in the driver's seat.

Q. Where did you go?

A. I sat in the driver's side, as he pulled in behind me, his driver's side door was closest to the rear of my vehicle, so I entered the back seat driver's side of his Suburban.

Q. What happened next?

A. Once I was inside the vehicle there was very limited conversation, like all the transactions I have had with [Burks], but one statement that he made that stood out to me that was also recorded during this transaction was he asked, quote, if I was across the bridge selling that shit, and to me which meant, you know, during my cover in this operation he knew me to live in Harford County and that I was a mid level or high level dealer of heroin in Harford County. So he was basically asking me if I was across the bridge, meaning in Harford County, selling the heroin, the suspected heroin that I was purchasing from him. I did answer that I was and that I was making money, a lot of money in Harford County.

Q. What happened next?

A. I noticed that [Burks] pulled out a large shoe box, or it might have been a boot box because it was a little bit bigger than maybe a pair of sneakers, and from underneath the driver's seat. He opened the lid. I wasn't able to see actually inside the shoe box. However, he took out two packages, they were wrapped in newspaper which I believe was the suspected heroin that I had arranged to purchase, to purchase from him. And in return, you know, he handed that back to me and I gave him the $3,100 that we agreed upon for the ten sticks, the ten logs of suspected heroin.

Tpr. Miranda recorded the audio and video of this transaction; the recording was admitted as State's Exhibit 18, and played for the jury.

A warrant for Burks's arrest was issued on March 11, 2015, and executed on March 16, 2015, at which time Burks was taken into custody in Elkton by Cpl. Joshua Justice of the State Police. Cpl. Justice transported Burks to the State Police barrack in North East for questioning. Burks was initially placed in a holding cell.

At about the same time Burks was being arrested, search warrants were being executed on two houses connected to Burks. Prior to questioning Burks, Cpl. Justice went to assist with the execution of search warrants. But, before Cpl. Justice left the barrack, he had a brief conversation with Burks. That conversation is the source of Burks's principal argument on appeal regarding the admissibility of his subsequently recorded interview. Cpl. Justice testified that the communication while Burks was in the holding cell was as follows:

> [BY CPL. JUSTICE:] When we got him [Burks] to the barrack, I told him that I had to leave because we were serving search warrants on the residence[s] where he stayed.
>
> [BY THE STATE:] Did you say anything to him at that time about speaking with him?
>
> [BY CPL. JUSTICE:] I told him I would come back later and we would have a chance to speak at that time.

When Cpl. Justice returned from assisting with the search warrants, he interviewed Burks. Agent Racine, of the FBI, also participated in the interview of Burks. The video-

recording of that interview was the target of Burks's unsuccessful pretrial motion to suppress, and is the subject of his first issue in this appeal.

Burks was tried by a jury in the Circuit Court for Cecil County on September 1-3, 2015. He was convicted of four counts of distribution of a controlled dangerous substance, two counts of conspiracy to distribute a controlled dangerous substance, and one count of possession with intent to distribute. He was sentenced to a total of sixty years' incarceration, and this appeal followed.

DISCUSSION

I. The Motion to Suppress

Burks contends in his brief in this Court: "The trial court erred in denying the defense motion to suppress appellant's statements during his custodial interrogation." In the circuit court, Burks raised the issue by way of his omnibus motion in which he included the following request, under the heading "Motions Pursuant to Maryland Rules 4-252 & 4-253":

> 37. That any statements and/or confessions taken from Defendant by police authorities were involuntary and/or elicited without mandatory procedural safeguards, and/or were the product of an illegal search and seizure, or were otherwise obtained in violation of Defendant's constitutional rights.
>
> WHEREFORE, Defendant respectfully prays that this Honorable Court suppress all statements and/or confessions taken from Defendant by police authorities.

The record does not disclose that any more-specific argument was made by Burks before the parties appeared in court on August 14, 2015, for a hearing on the motion to

suppress. When the hearing began, neither party presented an opening statement, but the prosecutor explained to the court that "[defense counsel] and I exchanged messages last evening after business hours and he advised me he did want to contest a statement that his client has made." The prosecutor said: "[T]his is a recorded statement. I guess what I plan to do is call the officer, let him briefly set the scene, and then play the tape from there." The prosecutor then called Cpl. Justice to explain the circumstances under which the interview was recorded. The recording was played, and it included a review of Burks's *Miranda* rights. The recording also showed that Burks initialed a form setting forth the *Miranda* rights. [3]

[3] Burks placed initials next to five statements on the form, indicating that his rights had been explained to him. The form advised:

> You are now being questioned as to any information you may have pertaining to an official police investigation. Therefore, you are advised of the following rights:
>
> 1. You have the right to remain silent.
>
> 2. Anything you say or write may be used against you in a court of law.
>
> 3. You have the right to talk to a lawyer before answering any questions and to have a lawyer present at any time before or during questioning.
>
> 4. If you now want the assistance of a lawyer but cannot afford to hire one, you will not be asked any more questions at this time and you may request the court to appoint a lawyer for you without charge.

continued . . .

On the recording, before Cpl. Justice and Agent Racine questioned Burks, they told Burks that he was not required to answer any questions, and, if Burks wanted to, he could just tell them to "fuck off," and they would "respect that." Cpl. Justice stated at the outset of the interview: "I can't promise you anything." Agent Racine similarly explained: "I can't make you any promises."

After the recording was played for the suppression court, Cpl. Justice reconfirmed that the statement had been recorded the same day that Burks had been arrested. He testified that the recording was complete and unedited.

On cross-examination, defense counsel asked the corporal about any conversations prior to recording the interview, and Cpl. Justice testified as follows:

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continued . . .

> 5. If you agree to answer questions, you may stop at any time and request the assistance of a lawyer, and no further questions will be asked of you.
>
> The recording showed that, in addition to placing his initials next to each numbered statement, Burks signed an acknowledgment which immediately followed the five numbered statements, stating: "I have read or have had read to me this explanation of my rights."
>
> At the bottom of the form is a paragraph captioned "Waiver of Miranda Rights," which contains another space for a subject being questioned to sign and date under the paragraph, which reads: "I fully understand each of these rights and I am willing to answer questions without consulting a lawyer or having a lawyer present at this time. My decision to answer questions is entirely free and voluntary and I have not been promised anything nor have I been threatened or intimidated in any manner." Appellant did not sign that acknowledgement. On cross-examination at the suppression hearing, Cpl. Justice testified that he "didn't read that section to [Mr. Burks], and I typically do not," because it is "redundant and we have no legal obligation to read it."

[BY DEFENSE COUNSEL]:
Q. Did you speak to my client prior to him going into the interview room?

A. Yes.

Q. Okay. Where did you do that?

A. In the cell. I told him I was going to interview him.

Q. And not on that tape, but in the cell did he indicate he wished to speak to a lawyer?

A. No, he did not.

When Burks testified at the suppression hearing, he described the brief holding cell conversation at two different points during his testimony. On direct examination, he testified as follows:

> [BY DEFENSE COUNSEL:] Did you have any conversation with that testifying officer [Cpl. Justice] prior to going into the interview room with respect to whether or not you wanted to make a statement or a lawyer or any of those issues?
>
> Yes.
>
> Q. Okay. What, if anything, did you discuss with this officer prior to going into that interview room?
>
> A. When I was in the holding cell he asked me is there anything in either house he should know about, and I told him, No.
>
> THE COURT: I'm sorry. Anything that?
>
> THE DEFENDANT: He asked me is there anything in either house regarding the 64 Willow Court and 331 Willow Drive that he should know about, and I said, No. . . . Then he said, Well, I will be back to talk to you, and then that's I guess when they went to go search both houses.
>
> THE COURT: Okay.

[BY DEFENSE COUNSEL]:
Q. And did you discuss – did he ask you or did you say anything to him about willingness to speak with him or a lawyer or any of those issues?

A. I asked him if I could speak to a lawyer, and he said that anything I say can help me and can't hurt me.

Q. And where was that said to you?

A. In the holding cell.

Q. In the holding cell in the barrack[]?

A. Yeah.

But, when Burks was asked on cross-examination about the holding cell conversation with Cpl. Justice, he did not repeat his assertion that the officer had stated that anything he said could help him. The cross-examination included the following testimony:

[BY THE PROSECUTOR]
Q. So, Mr. Burks, you said the officer, you are talking about the officer who testified here today is the one that spoke to you . . . in the holding cell?

A. Yes.

* * *

Q. What exactly did you say?

A. He told me that – he asked me if there was anything that I wanted to say to him, and I was, like, I want a lawyer, and then he was, like, Is there anything in either house, referring to 64 Willow Court and 331 Willow Drive.

Q. And what did you say to that?

A. I said, No.

After Mr. Burks testified at the suppression hearing, the prosecutor recalled Cpl. Justice as a rebuttal witness. The court noted for the record that Cpl. Justice had not been present in the courtroom during Mr. Burks's testimony. The rebuttal testimony included the following testimony relative to Mr. Burks's claims that he had requested an attorney and had been told that anything he said could help him and could not hurt him:

> [BY THE PROSECUTOR]
> Q. . . . What did you say to him?
>
> A. I told him that we were going to serve search warrants on the houses and I told him I would be back whenever we were able to get done to actually speak with him.
>
> Q. Did he ask you at any time during that conversation, did he indicate that he wanted to have a lawyer present?
>
> A. No, he did not.
>
> Q. Had he done that, what would you have done?
>
> A. I wouldn't have spoken with him any further.
>
> * * *
>
> Q. . . . Mr. Burks indicates that he asked for a lawyer prior to around [sic] the time that he was signing the Miranda form. Do you recall that happening?
>
> A. No. That did not happen.
>
> Q. Did he ever ask you for a lawyer during that interview?
>
> A. No, he did not.

On cross-examination, Cpl. Justice again denied that Mr. Burks had ever made a request for an attorney:

[BY DEFENSE COUNSEL]
Q. How long did you speak to him in the holding cell?

A. Maybe 30 seconds.

Q. And you said if you had been asked for – if he had asked for a lawyer, you would have stopped the questioning. Correct?

A. No. I said I wouldn't have questioned him.

Q. Well, if he asked for one at any point in time, you would have stopped the questioning. Correct?

A. Yes. Any time during the interview had he asked for a lawyer, yes, I would have stopped.

Q. Not during the interview, but any time, whether it was a specific formal interview on video or –

A. Yes. Any time. If he wanted a lawyer, I either wouldn't have questioned him or he would have had a lawyer.

On appeal, Burks relies on a line of cases that places a burden upon the State to refute a defendant's testimony that his statement was "obtained by improper threats, promises, or inducements." *Henry v. State*, 204 Md. App. 509, 539 (2012). We explained in *Henry*: "For the State to introduce the confession in evidence, it must adduce specifically contrary evidence, thus rebutting the presumption of involuntariness. If it fails to do so, the presumption remains that the confession is involuntary." *Id*. *See Gill v. State*, 265 Md. 350, 353-54 (1972) ("[B]efore a suspect's statement can be received in evidence the State has the affirmative duty of showing it was freely made and not the product of promises or threats. . . . [W]hen it is contended that someone employed coercive tactics to obtain inculpatory statements, the charge must be rebutted. . . . Since it is uncontradicted that the

suspect was in fact in the sole presence of this police interrogator, that specific person must rebut the allegations of coercion as no one else is qualified to do so."); *Streams v. State*, 238 Md. 278, 283 (1965) ("We think the State's failure, after Streams left the stand, to go forward with testimony which would refute his claim of promises and threats and to show the conduct of the police during the period he was in custody of the arresting officers was enough under the circumstances of this case to require a holding that the judgments appealed from must be reversed because the State did not meet its burden of establishing the voluntariness of the confessions as a prerequisite to their admission in evidence.").

Based on this line of cases, appellant argues that Cpl. Justice did not specifically testify that he did not tell Mr. Burks that anything he said could help him and could not hurt him, and, in the absence of an explicit denial by the officer, the recorded interview had to be suppressed as involuntary.

We disagree for several reasons. First, this argument is unpreserved because it was never brought to the attention of the circuit court. During the hearing on the motion to suppress, defense counsel never mentioned that the motion was based upon a comment from Cpl. Justice misrepresenting that anything Mr. Burks said could only help him. To the contrary, the arguments made by defense counsel at the suppression hearing focused on two points (neither of which has to do with the holding cell conversation): (a) the State Police advice of rights form, which was reviewed with Mr. Burks during the recorded interview, has a waiver paragraph at the bottom form that was not read aloud to the appellant, and was not signed by appellant; and (b) a statement by the officers indicating

that they were not going to add any further charges if he directed them to additional evidence. The argument made at the suppression hearing was as follows:

> [BY DEFENSE COUNSEL]: Your Honor, they have a state police form and the state police form, it has advisement of rights and it has a waiver of those rights. That's apparently what the Maryland State Police use. **The advisement of rights was acknowledged by my client.** The specific waiver of them, specifically the specific question, "I'm willing to answer questions without consulting a lawyer or having a lawyer present at this time. My decision to answer is entirely free and voluntary and I have not been promised anything, nor have I been threatened or intimidated in any manner." That's not signed. The questioning, the questioning, he was asked to read that, read it, that was clear from the video, and he did not sign that, Your Honor, after having been read it. Without waiving it, there was non-stop questions. At no point in time do they ask him orally if he waives his rights to a lawyer. They just started questioning him. He's in custody. I think that under those circumstances, having asked him to read the document, having asked him to read the document about the waiver of it and him not having signed it, is indication that he had not waived his *Miranda* rights.
>
> Secondly, Your Honor, if you look, one of the charges that my client has is with respect to if he says anything about I guess the date March 16th. I forget which count it is, Your Honor, but there's like --- if you look at the charging documents, there's five different dates or date ranges in there, and one of the last dates is I think it's the March 16th date. In there they said they are not going to charge him any further with anything if he makes any statements in here. They charged him with the March 16th count. **So not only was the whole of this in violation of his right to counsel, but certainly charging him with something they said they weren't going to charge him with makes any statements not free and voluntary. So I ask that the interview and any statements relative to that be suppressed.**
>
> I would say to Your Honor as far as the other evidence in this case, what do we have? We have about five different date ranges of buys that they made. I don't think that this interview is critical to any of the issues in it because you are talking about in each instance my client --- the evidence against him is that my client sold narcotics to undercover agents. Not like relying on third parties to prove that the transaction was made and the substance was a controlled dangerous substance. **So this issue about this proof or evidence that they would like to enter statements he made *I don't think satisfies my client's right to counsel and, in fact, violates it.***

> ***And for that reason, I ask that any statements made that were on that interview be suppressed.***

(Emphasis added.)

Mr. Burks argues on appeal that the prosecutor and the suppression court should have somehow recognized that the motion to suppress was based on Mr. Burks's one-time-only assertion: "I asked him if I could speak to a lawyer, and he said that anything I say can help me and can't hurt me." But we agree with the State that trial judges are not required to be clairvoyant and detect unasserted legal positions, and we see no possibility that the suppression court could have understood that it was being asked to suppress the recorded interview because Cpl. Justice had not adequately rebutted Mr. Burks's assertion that anything he said could only help him.

Second, the comment upon which Mr. Burks bases his appellate argument was part of the single sentence of testimony in which he alleged that he asked for an attorney. The allegedly improper inducement to confess was, according to Mr. Burks, a response to his request for an attorney. He said: "I asked him if I could speak to a lawyer, and he said that anything I say can help me and can't hurt me." But the suppression judge found that Mr. Burks never asked for an attorney. The court stated: "I do not find that Mr. Burks made any request for an attorney, and so I find that the statement which is contained in this recording is, in fact, admissible and will not be suppressed." *See Lee v.* State, 418 Md. 136, 148 (2011) (" '"[W]e view the evidence and inferences that may be reasonably drawn therefrom in a light most favorable to the prevailing party on the motion,"' here, the State. *Owens v. State,* 399 Md. 388, 403, 924 A.2d 1072, 1080 (2007) (quoting *State v. Rucker,*

374 Md. 199, 207, 821 A.2d 439, 444 (2003)), *cert. denied,* 552 U.S. 1144, 128 S.Ct. 1064, 169 L.Ed.2d 813 (2008). 'We defer to the motions court's factual findings and uphold them unless they are shown to be clearly erroneous.' *State v. Luckett,* 413 Md. 360, 375 n. 3, 993 A.2d 25, 33 n. 3 (2010).").

As already discussed, the suppression court was never asked to make a finding one way or the other about whether Cpl. Justice had told Mr. Burks that anything he said could help him and could not hurt him. But the court's express finding that Mr. Burks did not make any request for an attorney necessarily includes an implicit finding that Cpl. Justice did not reply to such non-existent request with the words attributed to him by Mr. Burks.

Third, even if the suppression court had ascribed any plausibility to Mr. Burks's assertion that Cpl. Justice responded to a request for an attorney by telling him anything he said could not hurt him, the State *did* present evidence to refute that claim. The recording of the interview included an explicit discussion of the fact that anything he said could be used against him in a court of law. Moreover, the prosecutor called Cpl. Justice in rebuttal and asked him point blank about the brief conversation in the holding cell: "What did you say?" The officer's answer to that question directly contradicted Mr. Burks's testimony about a request for an attorney and any inducement to talk to the police: "I told him that we were going to serve search warrants on the houses and I told him I would be back whenever we were able to get done to actually speak with him." Accordingly, even if Mr. Burks had preserved an argument about the State's obligation to refute a claim of improper inducement, the State met that burden here.

Finally, even if Mr. Burks prevailed on his argument that the State had not adequately rebutted his claim that Cpl. Justice made the statement in the holding cell as alleged by Mr. Burks, the evidence nevertheless failed to establish any causation. As the Court of Appeals explained in *Hill v. State*, 418 Md. 62, 76 (2011), there is a two-prong test applicable to a voluntariness challenge, and the party challenging the admissibility of a confession must prevail on both prongs:

> In *Hillard* [*v. State*, 286 Md. 145 (1979)], we established a two-pronged test for determining whether a confession is the result of an improper inducement by law enforcement. Under that test, an inculpatory statement is involuntary and must be suppressed if: (1) any officer or agent of the police force promises or implies to a suspect that he will be given special consideration from a prosecuting authority or some other form of assistance in exchange for the suspect's confession, and (2) the suspect makes a confession in apparent reliance on the police officer's explicit or implicit inducement. *Hillard*, 286 Md. at 153, 406 A.2d at 420. "Both prongs of the *Hillard* test must be satisfied before a confession is deemed to be involuntary." *Winder*, 362 Md. [275] at 310, 765 A.2d at 116 [(2001)].

To satisfy the second prong, the challenger must establish reliance upon the improper inducement. The Court of Appeals explained in *Winder*, 362 Md. at 311-12:

> The second prong of the *Hillard* test triggers a causation analysis to determine whether there was a nexus between the promise or inducement and the accused's confession. In *Reynolds* [*v. State*, 327 Md. 494 (1992)], we made clear that **"[i]f a suspect did not rely on an interrogator's comments, obviously, the statement is admissible regardless of whether the interrogator had articulated an improper inducement.** By definition, there would have been no 'inducement' at all, because the interrogator 'induced' nothing." *Reynolds*, 327 Md. at 509, 610 A.2d at 789. *See also Johnson v. State*, 348 Md. 337, 350, 703 A.2d 1267, 1274 (1998).

(Emphasis added.)

Here, the video-recording showed that, regardless of anything that was said to Mr. Burks when he was in the holding cell, he was subsequently advised in detail that neither Cpl. Justice nor Agent Racine could provide any assistance to him, that he did not have to talk to them or even be civil to them, that he was entitled to an attorney, and that anything he did say could be used against him in a court of law.

At the suppression hearing, Mr. Burks never testified that the reason he made statements during the interview was Cpl. Justice's alleged comment that it could only help for him to do so. On the contrary, Mr. Burks was asked on cross-examination: "Why did you keep answering questions if you didn't want to answer questions [without a lawyer]?" He responded: "Because it wasn't going to make a difference whether I answered them or didn't answer them, they wasn't going to take me back to my holding cell." Given the fact that Mr. Burks never even argued in the circuit court that the *Miranda* advisements were overcome by the statement allegedly made by Cpl. Justice in the holding cell, the State clearly met its burden of proving that there could not have been any reliance by Burks even if Cpl. Justice had said at an earlier point in time "anything [you] say can help [you] and can't hurt [you]."

II. Conspiracy convictions

Burks challenges the sufficiency of the evidence to support two separate conspiracy convictions relative to the transactions that occurred on December 22, 2014, and January 11, 2015. In his brief, he argues: "The State introduced no evidence whatsoever of any prior agreement between Appellant and the completely anonymous African-

American males with whom he allegedly 'conspired' on the dates in question, or of advance planning to accomplish the [two conspiracy] crimes for which he was separately convicted." We disagree that the evidence was insufficient to support the convictions.

When we review a claim of insufficiency of the evidence, we assess "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 a crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *Accord Tracy v. State*, 423 Md. 1, 11 (2011); *Smith v. State*, 415 Md. 174, 184 (2010).

The Court of Appeals summarized the elements of a criminal conspiracy in *Carroll v. State*, 428 Md. 679, 696-97 (2012):

> "A criminal conspiracy consists of the combination of two or more persons to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means." *Khalifa* [*v. State*], 382 Md. [400] at 436, 855 A.2d at 1196 [(2004)] (quoting *Townes v. State*, 314 Md. 71, 75, 548 A.2d 832, 834 (1988)). The agreement at the heart of a conspiracy "need not be formal or spoken, provided there is a meeting of the minds reflecting a unity of purpose and design." *Id*. The crime is complete when the agreement is formed, and no overt acts are necessary to prove a conspiracy. *Id*.

As this Court noted in *Carroll v. State*, 202 Md. App. 487, 505-06 (2011), a criminal conspiracy may be inferred from circumstantial evidence of a common design:

> "'[I]t is sufficient if the parties tacitly come to an understanding regarding the unlawful purpose . . . . [T]he State [is] only required to present facts that would allow the jury to infer that the parties entered into an unlawful agreement.'" *Armstead v. State*, 195 Md. App. 599, 646 (2010) (quoting *Acquah v. State*, 113 Md. App. 29, 50 (1996)), *cert denied*, 418 Md. 191 (2011). A conspiracy may be shown by "'circumstantial evidence from which an inference of common design may be drawn.'" *Id*. (quoting *McMillian v. State*, 325 Md. 272, 292 (1992)).

"The concurrence of actions by the co-conspirators on a material point is sufficient to allow the jury to presume a concurrence of sentiment and, therefore, the existence of a conspiracy." *Acquah, supra,* 113 Md. App. at 50 (citing *Hill v. State,* 231 Md. 458, 190 A.2d 795, *cert. denied,* 375 U.S. 861, 84 S.Ct. 127, 11 L.Ed.2d 88 (1963).) In this case, Tpr. Miranda's testimony and the recordings of his encounters with Burks's associates provided sufficient evidence to support the jury's finding of criminal conspiracies between Burks and his two separate compatriots on the two days in question.

As noted above, Tpr. Miranda testified that, on December 22, 2014, he dealt directly with an African-American man, approximately twenty years of age, with an Afro-style haircut; and on January 11, 2015, he dealt directly, at least initially, with an "older African-American male[.]" In each instance, Tpr. Miranda made the initial contact via text with Burks, arranged to purchase a quantity of heroin, and was told to go to "the cut" or "the trap" at a specified time. When he did so, on December 22, 2014, he was approached by a young man with an Afro, who handed him three of the three-and-a-half "sticks" of heroin Tpr. Miranda had previously arranged to purchase from Burks. The young man walked to a vehicle known to be associated with Burks, and later returned to Tpr. Miranda to collect the money that was owed to Burks. Tpr. Miranda later texted Burks, informing him that Tpr. Miranda had only gotten a part of the order they had agreed on, and Burks texted back that the mix-up was his "fault." Screenshots of these text messages were admitted in evidence.

Similarly, Tpr. Miranda arranged, via text message, to meet Burks at "the cut" on January 11, 2015, to purchase five "sticks" of heroin for $1,600. When he arrived, an older African-American man emerged from a black Chevy Tahoe and asked Tpr. Miranda to "pull further to the back of the court." When Tpr. Miranda did so, the black Chevy Tahoe --- driven by Burks --- followed. Burks then got out of the Tahoe, approached Tpr. Miranda's vehicle, retrieved a package from his sweatshirt pocket, and handed it to Tpr. Miranda, in exchange for $1,600. The package contained the amount of heroin Tpr. Miranda had previously arranged to purchase from Burks. The jury also saw and heard the video- and audio-recorded surveillance tapes of these transactions.

The jury also viewed and heard the video-recording of Burks's interview by Cpl. Justice and Agent Racine, in which he told those officers that he has "a bunch of young boys serving up for him" while Burks himself "sit[s] back." The jury witnessed one of the "servants" of Burks assisting him in making the heroin sales to Tpr. Miranda on December 22, 2014, and a second servant assisting on January 11, 2015.

In short, there was sufficient evidence of concerted action and unity of purpose from which a reasonable factfinder could have concluded that Burks had engaged in a conspiracy to distribute heroin with each of the unidentified men.

III. The Multiplicity Argument

Because there was sufficient evidence to support each of Burks's conspiracy convictions, as noted above in Section II, and the evidence indicated that a totally different

co-conspirator was a participant in each separate transaction, merger of the two convictions for sentencing purposes was not required.

"The unit of prosecution for conspiracy is the agreement or combination, rather than each of its criminal objectives." *Savage v. State*, 212 Md. App. 1, 13 (2013) (internal quotation marks and citations omitted). In *Savage*, we observed that "there was testimony that, if credited by the jury, might establish, as a matter of law, two separate conspiracies." *Id*. at 24. We pointed to evidence that one conspirator backed out and a succeeding conspirator entered into an agreement to carry out a similar plan. *Id*. at 25-26. We said in *Savage*, *id*. at 31: "Had (1) the jury been properly instructed, (2) a two-conspiracy argument been advanced by the State, and (3) the jury found either a single conspiracy or multiple conspiracies, we would, in a sufficiency review, review the evidence in the light most favorable to the jury's verdict."

Here, the jury was instructed on two separate counts of conspiracy, and the State argued for the jury to find two conspiracies because of the different participants. Under the circumstances, there was sufficient evidence of two conspiracies, and merger was not required.

JUDGMENTS OF THE CIRCUIT COURT FOR CECIL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.