UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1697

September Term, 2015

TRAVIS PORTER

v.

STATE OF MARYLAND

Wright,
Berger,
Shaw Geter,

JJ.

Opinion by Berger, J.

Filed: February 6, 2017

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Appellant, Travis Porter, was indicted in the Circuit Court for Howard County, Maryland, and charged with second-degree burglary and theft of property of value less than $1,000.00. After he was convicted by a jury on these charges, appellant was sentenced to concurrent sentences of three years for second-degree burglary and theft under $1,000.00, with all but one year suspended, to be followed by three years of supervised probation.[1] Appellant timely appealed and presents the following questions for our review:

> 1. Did the trial court err in (a) admitting into evidence a surveillance video without proper authentication, and (b) in permitting prosecution witnesses to narrate the events purportedly depicted by the video?
>
> 2. Did the trial court err in admitting hearsay evidence?

For the following reasons, we shall affirm.

BACKGROUND

At around 6:30 a.m. on March 5th, 2015, Michael Thompson, Sr., a maintenance worker for the Holiday Inn hotel located in Jessup, Maryland, went to the fourth floor and saw appellant standing at the far end of the hall, near two "shut" doors next to the maintenance shop room. Thompson explained that these doors had an automatic closer attached to them and, at the time, were "secure" and "closed." After seeing appellant lingering near the doors, Thompson went back down to the first floor office area, where

[1] The jury also convicted appellant of the uncharged lesser-included charge of fourth degree burglary, a charge that was submitted upon the request of defense counsel. No sentence was imposed on that fourth-degree burglary conviction.

the hotel cameras were located, and was able to see appellant "standing at the shop door with a piece – a laundry detergent box that he was trying to pry the door open." Thompson explained that the shop was used to store screwdrivers, power tools, electrical equipment and "[e]verything we need to – to run the hotel with." Thompson also testified that he saw that the door, previously closed, was now open. When Thompson returned to the fourth floor, the door was again closed and appellant was no longer outside the shop door. Thompson then opened the maintenance room door with his card, and found appellant inside the room, holding a Holiday Inn screwdriver in his hand. Thompson then "took him to the ground." Thompson asserted that appellant did not have permission to be in the maintenance shop room.

After appellant was detained, he claimed that he wanted to use the hotel phone, but Thompson testified that the hotel phone was located on the first floor. Thompson then called the hotel managers, testifying that he told them, "I [saw] somebody trying to break into the shop door because right beside the shop is the laundry room."

When the police arrived in response to Thompson's call, they searched appellant and recovered Thompson's personal keys to his truck, as well as Thompson's work keys. Appellant also had on his person a set of keys belonging to hotel employee Mike Kirsch, a box cutter, and Holiday Inn key cards, but apparently for the guest rooms at a different Holiday Inn. In the adjacent laundry room, Thompson also found a flashlight, another screwdriver, and a "computer box that scans every door in the hotel." That box, also referred to as a "door coder," was available only to maintenance workers, was normally

stored in the shop room, and was worth, according to Thompson, approximately five to six hundred dollars.

On direct examination, Thompson was asked about the hotel security cameras. He testified that there were several cameras located on each floor. Thompson explained that the cameras were "protected" and that they looked like "smoke detectors on each corner of each hallway." When he was observing appellant on one of these cameras, *i.e.*, the "far left" camera on the floor, Thompson was inside the hotel office. Thompson explained that there was a computer screen that contained the image from each camera. There were over a hundred cameras associated with the hotel and he had to "punch the code" to bring up the fourth floor camera.

Thompson agreed that he observed appellant on camera, near the maintenance door, in "live time." He also testified that he did not watch the recording of appellant's activities until earlier on the same day of trial, at the prosecutor's instruction. Thompson was asked whether that recording accurately portrayed what he saw while he was physically on the fourth floor on March 5th and what he saw on the computer screen in the office area. Thompson testified that "[e]verything is the same."

On cross-examination, Thompson agreed that he did not install the surveillance cameras and was unsure of their "type." However, Thompson averred that he was trained in how to operate the cameras and that he did, in fact, know how to use them. Thompson agreed that he did not actually see appellant enter the maintenance room and that there was no damage to the door.

On redirect examination, Thompson testified that the cameras were "motion cameras" that were activated by "movement, like in the hallway." Thompson testified that he was trained how to zoom in on the camera and how to select which hallway to observe. When he entered the office area on the day in question, he found that the cameras were already operating, and each screen was numbered according to the number of the camera. Thompson then "click[ed]" through the screens to use the surveillance system. Thompson again agreed he did not know the manufacturer of the cameras, or the particular serial number of the cameras he witnessed, but maintained that this information did not affect his ability to use the cameras. He also testified, on recross examination, that if the cameras needed maintenance, he would call an outside vendor.

Also testifying at trial for the State was Sean Hawbecker, the controller and human resources manager for the Holiday Inn in Jessup. Hawbecker testified that he was familiar with the layout of the hotel and knew that there were approximately twenty to twenty-five "motion sensor" cameras distributed throughout the hotel property. There were two such cameras on the fourth floor. The maintenance room was located on the fourth floor, and Hawbecker testified, without objection, that the door to that room was "secured and locked."

On the day in question, Hawbecker heard a call from Thompson and then responded to the fourth floor maintenance room. There, Hawbecker saw Thompson "restraining an individual that had – he had found in the maintenance room." Hawbecker

then went to meet the police, escorted the police back to the maintenance room, and observed the police arrest appellant.

Hawbecker further testified that the police retrieved a number of room key cards that looked similar to the ones provided to the guests at this Holiday Inn. However, Hawbecker testified that those cards were not active at the time. He explained that "[t]he keys have a certain time limit that they will open a certain door, multiple doors and seeing if any were active to open any doors at the time."

Hawbecker also clarified that the door coder box found concealed in the laundry room was worth over $1,000.00. Hawbecker explained that it was valued that high because "[w]hen used correctly it can open any door, including a dead bolted door in the hotel."

Hawbecker then testified that he went back to the hotel office and watched some of the recorded footage from the fourth floor cameras. In that recording, Hawbecker saw an individual talking to one of the housekeepers and then proceeding into the laundry room near the end of the hall. Hawbecker testified, "that was the last I saw of [appellant]."

This recorded footage was provided to the police the same day. Hawbecker witnessed the assistant front office manager, Daniel Kerwin, make a copy of the footage from one of the fourth floor cameras and store it on a USB drive. Hawbecker testified that he "observed [Kerwin] open the box that the DVRs are held in, plug in a USB and slow down the footage and save it in real time to the USB drive." Hawbecker then

identified that same USB thumb drive during trial. Hawbecker also testified that he did not see Kerwin manipulate or alter the footage, testifying that "[n]othing was changed or manipulated."

On cross-examination, Hawbecker agreed that he did not install the cameras but believed they had the brand name, "Silent Night," and were installed in 2012. The cameras were motion activated but Hawbecker did not know the "degree of motion" required to activate them. Hawbecker confirmed that if the cameras needed service, the hotel would contact an outside vendor. There was no maintenance contract for the cameras and the vendor was called "as needed."

Hawbecker also reiterated that Daniel Kerwin transferred the footage to the USB drive because "[h]e has a knowledge of how to save it and I do not." And, Hawbecker added that Kerwin "understands how to save the footage. I understand how to go back and look at the footage." Hawbecker also clarified that Kerwin slowed the footage down four times, or "as much as it possibly could have been." Hawbecker further testified that the recording began at the moment they observed appellant speaking to the housekeeper near the laundry room. Hawbecker explained that the decision on what to record was made by Hawbecker, Kerwin, and the responding police officers.

On redirect examination, Hawbecker confirmed that he reviewed the surveillance footage in this case both on the day of the incident and with the prosecutor at a later date. There was no difference between the footage he reviewed with the prosecutor and the footage he saw prior to it being transferred to the USB drive. On recross, Hawbecker

agreed that he did not see the events depicted on the video recording footage as they transpired live. He also agreed there were time gaps in the footage.

Officer Bryan Mason, of the Howard County Police Department, responded to the Holiday Inn with another police officer at approximately 8:59 a.m. on May 5, 2015. When he arrived, he found a maintenance worker kneeling over appellant. Officer Mason testified, without objection, that he was told by a Holiday Inn employee that the room where appellant was found was locked.

Officer Mason then asked to see any available surveillance video footage. When asked to describe what he saw on the video, Officer Mason testified, without objection, as follows:

> We saw – well, I saw a – there was a maid that was going from room to room, and then there was a black male subject who was later identified as Mr. Porter just walking around through the hallway of that floor of the area where the storage room was entered. He disappeared off the camera for few seconds, and then he came back for a few minutes. He came back in front of the storage area, which was locked. And he was standing in front of the door and the next you know he went inside the door.

Officer Mason continued that, "[a] short time later you saw the maintenance guy go inside . . ." followed by other people standing near the doorway, however, "[y]ou couldn't see inside the unit itself."[2] Officer Mason testified he viewed the video on the

[2] At this point, defense counsel asked for a "standing objection" to all of Officer Mason's testimony. The court denied the request, stating, "I'm not going to give you a continued objection, but if you find something objectionable, just note that for the (continued)

camera system which was located downstairs in the hotel behind the "customer service area." Officer Mason continued that "[o]ne of the employees who I guess operates the system was able to pull the footage up." Mason confirmed that the manner in which this video was shown to him was consistent with the way video surveillance had been shown to him in other unrelated investigations.

Officer Mason then testified that the employee who showed him the footage told him that he would make a copy and give it to Corporal Erik Reid. Officer Mason had since reviewed the footage that was copied and determined that there was no difference between what was recorded and what he observed saw while looking at the surveillance video in the hotel office area.

On cross-examination, Officer Mason did not recall if he watched video from the two cameras located on the fourth floor and believed he only saw footage from the one camera located closest to the maintenance room. He agreed that the video included "a time elapse [sic] where it jumps from frames" as it played. Officer Mason did not inquire as to cause of these time gaps. Officer Mason also agreed he did not see the video being copied, and did not know the type of cameras that recorded the surveillance.

On redirect examination, Officer Mason agreed he was familiar with motion sensor cameras and testified that he was aware that the Holiday Inn used cameras of this type on the property. He believed that use of these types of cameras could result in gaps

(continued)
record." Defense counsel then immediately replied, "I object," and the court overruled the objection.

in the footage. Asked why he was interested in viewing the surveillance footage, Officer Mason testified, without objection, "[s]o that we can see the Defendant actually making the access to the room that was said he had entered unlawfully."

Also testifying was Corporal Erik Reid, of the Howard County Police Department. Without objection, Corporal Reid explained the circumstances leading up to his arrival on the scene, as follows:

> On March 5th approximately 8:59 a.m. I received a call to respond to the Holiday Inn for a breaking and entering in progress. Communications advised me that a maintenance worker had caught a suspect in a maintenance room and had him detained and was holding him to the ground waiting for our arrival.

When Corporal Reid arrived, Hawbecker met him and led him to the fourth floor maintenance room, where Thompson was holding appellant down on the ground. After appellant was arrested, Officer Mason went downstairs to view the surveillance video while Corporal Reid searched appellant. Recovered from appellant's person were five sets of keyrings, a box cutter, and a stack of Holiday Inn plastic key cards. These items were not retained for evidence purposes, or apparently even photographed, and were returned to their respective owners on the scene. However, appellant's wallet was seized and admitted into evidence at trial.

Pertinent to our discussion, Corporal Reid identified the USB drive that was provided to him by a member of the Holiday Inn staff.[3] Corporal Reid viewed the video afterwards and testified to the chain of custody for that exhibit. Over objection, Corporal Reid then testified as follows:

> Okay. I was able to view the video. I observed a subject in the hallway on the fourth floor. I was able to identify the subject as Travis Porter based on his clothing from – that I was able to observe him on that day, his appearance.

Corporal Reid testified that he viewed the surveillance video approximately three times in this case and that he did not alter the footage contained on the USB drive. He further testified that he was familiar with motion sensor cameras and that it was not unusual for there to be time gaps in such footage.

On cross-examination, Corporal Reid agreed he did not know the type of camera used by the Holiday Inn. He also did not know how much motion was required to activate the camera, how long the camera then recorded, or how often these cameras were maintained.

Corporal Reid also agreed that he did not know the name of the staff member at the hotel who copied the footage onto the USB drive and he did not witness the footage being copied because he was transporting appellant to the police station at the time. He agreed that he only saw the video after it had been copied onto the USB drive.

[3] Although the USB drive containing the surveillance video ultimately was admitted into evidence at trial, that exhibit is not included with the record on appeal.

Thompson was then recalled by the State. Over defense objection, details of which will be discussed hereinafter, Thompson narrated portions of the video surveillance, identifying the fourth floor and the door leading to the maintenance shop. Thompson indicated where he was located when he was on the fourth floor and actually watching appellant. Thompson watched for a period of time, approximately fifteen to twenty minutes according to his testimony, then went into a room for a brief period. At that time, appellant was near the laundry room. Thompson also reiterated that he subsequently went downstairs to watch the video feed on the screen in the office before returning to the fourth floor, opening the maintenance shop room door and discovering appellant inside. He also noted that, on the video, the shop room doors were "propped open" after he detained appellant.

Thompson then testified as follows:

> Q. Now, can you describe the accuracy of what this video displays regarding what you observed with your eyes and also on the camera on the 25th [sic] of March?
>
> A. I mean, this is everything that I had seen right here. Exactly.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: What you see right now that's on the camera is what happened that day.
>
> BY [PROSECUTOR]:
>
> Q. And from the camera from this footage is it clear to you that that is the Holiday Inn fourth floor indicating the

> maintenance room as it was, the carpet as it was, the layout of the floor as it was?
>
> A. Yes, ma'am. We installed all that, yes.
>
> On cross-examination, Thompson was asked the following:
>
> Q. So just to be clear, Mr. Thompson. You're saying that what's depicted in the video is what you saw that day?
>
> A. That's what happened that day.

We may include additional detail in the following discussion.

DISCUSSION

I.

Appellant first contends that, not only was the Holiday Inn surveillance footage inadmissible because it was not properly authenticated, but also, several State's witnesses should not have been permitted to describe what they observed, either live or recorded, on that same video footage. The State responds that many of appellant's specific complaints are not preserved, are without merit, and are harmless beyond a reasonable doubt.

A. The Hotel Surveillance Video Recording Was Sufficiently Authenticated.

Appellant first challenges the authentication of the video recording, contending that Thompson, the employee who ultimately caught him inside the maintenance room, did not have complete personal knowledge of the events that transpired in real time. Appellant continues that the remaining witnesses did not satisfy the "silent witness" method of authentication, discussed in more detail below. The State responds that

appellant is offering different grounds on appeal by raising the two modalities of authentication when the arguments at trial were simply that there were deficiencies in the recording process and time gaps in both the recording and in the process. The State additionally replies that appellant's claims lack merit in any event and are harmless beyond a reasonable doubt.

Prior to trial, appellant filed a written motion *in limine* challenging the admission of the surveillance video on the grounds, *inter alia*, that there were "time gaps" in the video and because "[t]he requirement of authentication or identification as a condition precedent to admissibility has not been satisfied." Then, at trial, and immediately before jury selection, defense counsel argued that the gaps in the videos prevented admission of the video under either the firsthand knowledge or the silent witness theory of authentication.

The State responded that a witness, Michael Thompson, Sr., would account for any gaps in the video, as the video was recorded using motion-activated cameras, and that the video would be sufficiently authenticated under the dual theories of admission. The court reserved ruling on the admission of the surveillance video until later during the evidentiary portion of the trial.[4]

Thereafter, at a bench conference during Thompson's initial testimony, appellant maintained the objection that the video needed to be authenticated before it was shown to

[4] Appellant also argued against admission on additional grounds, namely, because the video was likely incomplete, under the doctrine of completeness, and due to an alleged discovery violation by the State. Those grounds are not being pursued on appeal.

the jury. Thereafter, the surveillance video was not shown to the jury until the second day of trial, when Thompson was recalled. Prior to Thompson retaking the stand, the State informed the court that Thompson had not viewed the video as it appeared on the USB drive but had viewed another copy that was transferred onto a CD-ROM disc. The State then moved for admission of the video on the USB drive, and defense counsel objected as follows:

> [DEFENSE COUNSEL]: I would object on the grounds that this is – there was a chain of custody breach. When the information was recorded, no one watched it being recorded. We don't know who recorded it. There was a gap between the time that it was recorded and when the police picked it up. We have no information on how it came to this court, the type of camera that was used. We have no information on the – we obviously don't know who recorded it since we don't know the person who recorded it. Selected that information to record. Can I retrieve my notes?
>
> THE COURT: Sure. Sure.
>
> (Counsel retrieve notes from trial tables.)
>
> [DEFENSE COUNSEL]: In addition, Your Honor, the original is a lot [sic] preserved without changes. This was slowed down.
>
> THE COURT: That it was what?
>
> [DEFENSE COUNSEL]: It was slowed. When they made the recording, they slowed it down. So there's no one who has explained how that could affect why they chose to slow it down. The duplication process has not been adequately explained. This was done in 2012 and we have no information that it's been redone at all since then.

The court then noted that Thompson testified that he watched the live feed from the cameras, stating:

> THE COURT: I'm sorry. Thompson. That he had occasion to watch the live projection of the cameras down onto the video screen downstairs as it was occurring and has had occasion to view the recording on the USB and that they were the same to the extent that he – was he there in the video or watching the video? But it doesn't account for some time when he may have been on the steps, but –
>
> [PROSECUTOR]: Your Honor, Officer Mason testified –
>
> THE COURT: Let me just – give me just one second. But he says he was trained to operate the equipment in terms of zeroing in on the right camera. Hawbecker? Is that how you say his name? Hawbecker?
>
> [PROSECUTOR]: Yes, sir.
>
> THE COURT: Testified that they had about 20, 25 cameras motion activated. That there's two cameras on the fourth floor. That he gave the USB copy of the video to the police on the same day that the incident took place. That it was placed on the USB drive under his observation as manager of the store. That Daniel Kurtland [sic, sp.] did it as he watched. That he opened a DVR and plugged in a USB.
>
> He did say he slowed it down to save it in real-time to the USB drive, but that nothing was changed or amended or deleted in the copy of the video. And that they started the recording at the time when the Defendant was first seen on camera. Now, he did say that the camera was motion activated. Detective Mason testified that he viewed the original and the USB. There were no differences in the two that he observed. So –

At this point, defense counsel challenged Officer Mason's testimony that other individuals were present on the surveillance video near the maintenance room, including Thompson. The court responded:

> THE COURT: But for me the question, whether there's been a prima facie showing of authenticity. There's a true and correct copy of the original recording. I have testimony of

> witnesses with knowledge. I've got comparisons of the actual video and the copy testifying to being the same. There's been testimony about the process of the motion activated that accounts for the video system stopping when there's no movement.
>
> So the jury could reasonably conclude that the evidence is what it purports to be. And I'll admit State's 4.
>
> [DEFENSE COUNSEL]: I need to just object.
>
> THE COURT: We can note your objection for the record. Thank you.
>
> BENCH CONFERENCE ENDS
>
> THE COURT: The USB is admitted into evidence.
>
> (State's Exhibit Number 4 admitted into evidence.)

The State contends on appeal that the grounds now being argued are different than those that were presented to the trial court. Maryland Rule 8-131 (a) provides, in pertinent part:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

The purposes of Rule 8-131 are:

> "(a) to require counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings, and (b) to prevent the trial of cases in a piecemeal fashion, thus accelerating the termination of litigation."

Fitzgerald v. State, 384 Md. 484, 505 (2004) (quoting *County Council v. Offen*, 334 Md. 499, 509 (1994)); *accord Maryland State Bd. of Elections v. Libertarian Party of Maryland*, 426 Md. 488, 517 (2012).

Generally, "[i]t is well-settled that when specific grounds are given at trial for an objection, the party objecting will be held to those grounds and ordinarily waives any grounds not specified that are later raised on appeal." *Klauenberg v. State*, 355 Md. 528, 541 (1999); *see also Gutierrez v. State*, 423 Md. 476, 488 (2011) (reiterating that "when an objector sets forth the specific grounds for his objection . . . the objector will be bound by those grounds and will ordinarily be deemed to have waived other grounds not specified") (citation omitted). And, "'[a] party must bring his argument to the attention of the trial court with enough particularity that the court is aware first, that there is an issue before it, and secondly, what the parameters of the issue are.'" *In re Roberto d. B.*, 399 Md. 267, 311 (2007) (quoting *Harmony v. State*, 88 Md. App. 306, 317 (1991)). Furthermore, "[t]he trial court needs sufficient information to allow it to make a thoughtful judgment." *Id.* at 311-12 (citation omitted).

Nevertheless, "the Court of Appeals has said that "an appellant/petitioner is entitled to present the appellate court with a more detailed version of the argument advanced" below." *State v. Greco*, 199 Md. App. 646, 658 (2011) (concluding that an issue was not waived where the State generally made the argument at trial, and where the trial court clearly decided the issue on the grounds raised on appeal) (citing *Starr v. State*, 405 Md. 293, 304 (2008)), *aff'd*, 427 Md. 477 (2012). And, "where the lower court was fully aware of the reasons advocated by counsel for and against the admissibility of the

evidence offered and ruled in favor of one contender against the other, we think both propositions of law should be considered briefly." *Wilt v. Wilt*, 242 Md. 129, 134 (1966); *see also Henry v. State*, 204 Md. App. 509, 537-40 (2012) (concluding that defendant was not required to cite state law cases in order to preserve issue of burden of proof). "Thus, as long as the party, whether in a civil or criminal case, clearly makes the judge aware of the course of action he or she desires the court to take and the reasons for such course of action, the party shall have adequately preserved that issue for appellate review." *In re Ryan S.*, 369 Md. 26, 35 (2002)

We are persuaded that, as to the authentication of the hotel surveillance camera footage, appellant is simply advancing a more detailed argument than the one raised in the trial court. Clearly, the trial court was aware that the video needed to be authenticated before it could be shown to the jury. And, clearly, defense counsel never waived such a challenge, arguing against its admission throughout the trial. We conclude that appellant's challenge to the authenticity of the video recording itself is properly before us on appeal.

On the merits, this Court explained the standard of review of a trial court's decision regarding the admission of evidence as follows:

> "Determinations regarding the admissibility of evidence are generally left to the sound discretion of the trial court. *Hajireen v. State*, 203 Md. App. 537, 552, *cert. denied*, 429 Md. 306 (2012). This Court reviews a trial court's evidentiary rulings for abuse of discretion. *State v. Simms*, 420 Md. 705, 724-25 (2011). A trial court abuses its discretion only when 'no reasonable person would take the view adopted by the [trial] court,' or 'when the court acts "without reference to any guiding rules or principles."'

> *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13 (1994))."

Baker v. State, 223 Md. App. 750, 759 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 708-09 (2014)).

Maryland Rule 5-901(a) governs authentication and provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." "[A]uthenticity concerns the genuineness of an item of evidence, not its admissibility." *Orr v. Bank of America*, 285 F.3d 764, 776 (9th Cir. 2002). We have pointed out that "if a prima facie showing [of relevance] is made, the writing or statement comes in, and the ultimate question of authenticity is left to the jury." *Gerald v. State*, 137 Md. App. 295, 304 (quoting 2 McCormick on Evidence § 227 (John W. Strong ed.1999)), *cert. denied*, 364 Md. 462 (2001). The "burden of proof for authentication is slight, and the court 'need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so.'" *Dickens v. State*, 175 Md. App. 231, 239 (2007) (quoting *United States v. Safavian*, 435 F. Supp. 2d 36, 38 (D.D.C. 2006)).

The Court of Appeals has made clear that videotapes and still photographs are both subject to the same general rules on admissibility. *Washington v. State*, 406 Md. 642, 651 (2008). Because photographs and tapes are "easily manipulated," courts require authentication "as a preliminary fact determination, requiring the presentation of evidence sufficient to show that the evidence sought to be admitted is genuine." *Id.* at

651-52. One method of authenticating a document is "the testimony of a witness with knowledge that the operative evidence is what it is claimed to be." Md. Rule 5-901(b)(1); *see also Washington*, 406 Md. at 652 ("[T]he pictorial testimony theory of authentication allows photographic evidence to be authenticated through the testimony of a witness with personal knowledge").

The second method is known as the "silent witness method of authentication," and that method "allows for authentication by the presentation of evidence describing a process or system that produces an accurate result." *Washington*, 406 Md. at 652*; see* Md. Rule 5-901 (b) (9). Specifically, a witness can "testif[y] to the type of equipment or camera used, its general reliability, the quality of the recorded product, the process by which it was focused, or the general reliability of the entire system." *Id.* at 653 (citations omitted). Whether videotapes are admissible under the silent witness theory of authentication is fact-specific, and trial judges have discretion in deciding whether counsel has laid a foundation sufficient to satisfy Maryland's evidentiary requirements. *Department of Pub. Safety & Correctional Servs. v. Cole*, 342 Md. 12, 26 (1996).

In this case, Thompson was an eyewitness to appellant's conduct, both directly, when he covertly watched appellant down the fourth floor corridor, and indirectly, when he watched appellant, live on the hotel surveillance cameras. Moreover, Thompson was able to view the video recording at a later date and testified that the recording depicted the same events that he personally witnessed. Without a doubt, Thompson had personal knowledge of the events depicted on the video footage. Moreover, any argument appellant has as to whether Thompson observed all of his conduct on the day in question

near the maintenance room door goes to weight, not admissibility. *See generally, Commonwealth v. Leneski*, 846 N.E.2d 1195, 1199 (Mass. App. Ct. 2006) ("Any concerns that the defendant had regarding the surveillance procedures, and the method of storing and reproducing the video material, 'were properly the subject of cross-examination and affected the weight, not the admissibility, of the' CD") (citation omitted); 3 Bergman & Hollander, *Wharton's Criminal Evidence* § 14:1, at 706-07 (15th ed. 1999) (trial judge determines whether reasonable juror could conclude by preponderance of the evidence that item is authentic; once that standard is met, authenticity requirement is satisfied and remaining challenges to authenticity go to weight the fact-finder gives item rather than to admissibility). We agree with the trial court that this sufficiently authenticated the surveillance video.

Authentication was also supported under the silent witness method. Again, most of appellant's arguments simply go to the weight of the evidence. On the pertinent question of admissibility, Thompson testified he was familiar with the cameras and testified that he knew how to operate them inside the hotel. Hawbecker provided more detail, testifying to the quantity of the cameras on the hotel property and explaining that some were "motion sensor" cameras, two of which were located on the fourth floor. Hawbecker further testified that he watched as Daniel Kerwin made a copy of the recording at issue and transferred it to a USB drive that was handed over to the Howard County police. Like Thompson, Hawbecker also confirmed that the video was not altered or manipulated in any way.

Appellant relies on *Washington* in support of his argument that the video recording was inadmissible. In *Washington*, two patrons, the petitioner and Jermaine Wright, began arguing with each other at a bar. The argument escalated and eventually the two stepped outside, where Wright was shot in the stomach. *Washington*, 406 Md. at 645. There were no witnesses to the shooting. *Id.* The State introduced silent witness evidence, a videotape and still photographs compiled from security footage, "to counter petitioner's argument that he was not the shooter, as well as to negate any mutual affray defense." *Id.* at 656. On appeal, the Court of Appeals held that "[t]he State did not lay an adequate foundation to enable the court to find that the videotape and photographs reliably depicted the events leading up to the shooting and its aftermath." *Id.* at 655.

The Court of Appeals highlighted the following problems with the State's evidence:

> Here, the foundational requirement is more than that required for a simple videotape. The videotape recording, made from eight surveillance cameras, was created by some unknown person, who through some unknown process, compiled images from the various cameras to a CD, and then to a videotape. There was no testimony as to the process used, the manner of operation of the cameras, the reliability or authenticity of the images, or the chain of custody of the pictures. The State did not lay an adequate foundation to enable the court to find that the videotape and photographs reliably depicted the events leading up to the shooting and its aftermath. Without suggesting that manipulation or distortion occurred in this case, we reiterate that it is the proponent's burden to establish that the videotape and photographs represent what they purport to portray. The State did not do so here.

Washington, 406 Md. at 655.

We are persuaded that *Washington* is distinguishable as this case did not involve the acquisition of video evidence from an unidentified, unknown source. Thompson and Hawbecker provided sufficient evidence for the judge to find that the video recording was what it purported to be. We discern no abuse of discretion in the court's ruling admitting the surveillance video recording at trial.

B. The Court Properly Exercised Its Discretion In Admitting Testimony Concerning The Hotel Surveillance Recording.

Appellant also argues the court erred in permitting Officer Mason, Corporal Reid, and Michael Thompson to narrate portions of the video. Appellant asserts that it was for the jury to draw its own conclusions from the video itself, and that this testimony amounted to improper lay opinion. The State responds that any complaint about Thompson is not properly presented because appellant "fails to identify particularly what testimony he finds objectionable." The State also contends that the court properly exercised its discretion in admitting the pertinent testimony. The State concludes that any error was harmless beyond a reasonable doubt.

As for the sole preservation argument presented by the State concerning its witness, Thompson, at trial, defense counsel objected on the general grounds that "the video is clear. He shouldn't be allowed to testify as to the clarity," and "[t]he jury should be able to look at that information and make their own . . . summation." This objection was overruled.[5] We are persuaded, under the circumstances of this case, that this was

[5] Although not raised by the State, it appears that the argument with respect to Corporal Reid was preserved, while any complaint as to Officer Mason was not. During (continued)

sufficient to alert the trial judge, and this Court, for that matter, to the issue. Although appellant does not specifically cite an isolated sentence or two from Thompson's trial testimony, we are satisfied that appellant's objection served to preserve the issue on appeal. *See e.g., Brock v. State*, 203 Md. App. 245, 270 (2012) (holding that issue was preserved "by the slimmest of reeds" when the defendant made a single reference to the use of a statement for impeachment purposes)

Accordingly, we turn again to the Maryland Rules of Evidence. Maryland Rule 5-701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Admission of lay opinion evidence under this rule is subject to an abuse of discretion standard. *Paige v. State*, 226 Md. App. 93, 124 (2015). "The rationale for the standard set by Rule 5-701 is two-fold: the evidence must be probative; in order to be probative, the evidence must be rationally based and premised on the personal knowledge

(continued)
trial, defense counsel objected to Corporal Reid "testifying about what he saw on the video," and that objection was overruled. However, in contrast, there was no objection when Officer Mason identified appellant on the video recording. It is questionable whether any objection to Mason's testimony is properly before us. *See Tshiani v. Tshiani*, 208 Md. App. 43, 51 n.6 (2012) ("'A contention not raised below either in the pleading[s] or in the evidence and not directly passed upon by the trial court is not preserved for appellate review.'") (quoting *Zellinger v. CRC Dev. Corp.*, 281 Md. 614, 620 (1977)).

of the witness." *State v. Payne*, 440 Md. 680, 698 (2014). As to whether an opinion is helpful to the trier of fact, this Court has stated:

> The requirement that the lay opinion testimony be helpful to the trier of fact precludes a lay witness from offering conclusions and inferences that the jury is capable of making on its own when analyzing the evidence. *See Baltimore & Y. Turnpike Road v. Leonhardt*, 66 Md. 70, 77, 5 A. 346 (1886) ("[W]here the question can be decided by such experience and knowledge as are ordinarily found in the common business of life, the jury [is] competent to draw the inferences from the facts without having the opinions of witnesses."); *Bey v. State*, 140 Md. App. 607, 781 A.2d 952 (2001) (reaffirming the century-old rule that a lay witness may not testify as to matters that the jury is capable of deciding itself). Thus, a lay witness is not qualified to express an opinion about matters "which are either within the scope of common knowledge and experience of the jury or which are peculiarly within the specialized knowledge of experts." *Bey*, 140 Md. App. at 623, 781 A.2d 952 (citing *Rosenberg v. State*, 129 Md. App. 221, 254, 741 A.2d 533 (1999), *cert. denied*, 358 Md. 382, 749 A.2d 173 (2000)).

Washington v. State, 179 Md. App. 32, 55-56, *rev'd on other grounds*, 406 Md. 642 (2008).

A similar argument was before us in *Paige, supra*. There, Paige argued that testimony from a loss prevention officer ("LPO") at the Columbia Mall Macy's was improper lay opinion. The challenged testimony involved the LPO narrating a surveillance video that depicted Paige's conduct in connection with an alleged shoplifting. *Paige*, 226 Md. App. at 116. After noting the LPO's familiarity and experience with the surveillance cameras, as well as the fact that this individual was operating the camera during Paige's attempted illicit shopping spree, we upheld the admission of the testimony. We did so on the grounds that the testimony, narrating the

store surveillance video, was based on the LPO's personal knowledge, was rationally based on the LPO's perception, and was helpful to provide a clear understanding of the underlying events depicted on the video. *Paige*, 226 Md. App. at 126-27. We explained in that case that the testimony was helpful because the LPO had "substantial familiarity" with Paige as a result of her eyewitness observations of Paige's conduct in the store. *Id.* at 127. We further cited favorably to a case from the Supreme Court of Kentucky, providing the following test:

> . . . "[T]he fulcrum of the matter upon which this issue turns, is whether the witness has testified from personal knowledge and rational observation of events perceived and whether such information is helpful to the jury. In short, does the testimony comply with the rules of evidence?" [*Cuzick v. Commonwealth*, 276 S.W.3d 260, 265 (Ky. 2009)] The Court held that "[w]hile a witness may proffer narrative testimony within the permissible confines of the rules of evidence, we have held he may not " interpret" audio or video evidence, as such testimony invades the province of the jury, whose job is to make determinations of fact based upon the evidence." [*Cuzick*, 276 S.W.3d at 265-66].

Paige, 226 Md. App. at 129.

In this case, appellant complains that Thompson, Officer Mason, and Corporal Reid should not have been permitted to "narrate" the surveillance video. Initially, we question whether any witness, other than Thompson, "narrated" the surveillance video. "Narrate" is defined as "1. To give an account or description. 2. To supply a running commentary for a movie or performance." The American Heritage Dictionary of the English Language, p. 1169 (4th ed. 2006). Here, the video was not shown to the jury until after Thompson was recalled by the State as its very last witness. Neither Officer

Mason nor Corporal Reid "narrated" the surveillance video, in the defined sense, because, when these officers testified, the video had not yet been shown to the jury. Thus, for the purpose of clarification, their testimony was not the equivalent of a spoken commentary describing the video as it was played for the jury.

However, as for Thompson, who did testify as the video was played, and to the extent that Officer Mason's or Corporal Reid's testimony could be considered as a "narration," we are not persuaded that their testimony impermissibly strayed into the exclusive realm of the jury. This is so because much of their testimony was based on their personal knowledge, either being on the scene during the course of the incident, or shortly thereafter. *See, e.g. People v. Hardy*, 981 N.Y.S.2d 722, 723 (N.Y. App. Div. 2014) ("Even when the witnesses described events depicted on the videotapes that they had not observed, they were still generally testifying about matters within their knowledge, and nothing in their testimony deprived defendant of a fair trial"), *leave to appeal denied*, 17 N.E.3d 506 (2014).

Contrary to any implication by appellant, witnesses are not *per se* prohibited from offering opinions that may identify individuals on a surveillance video recording. *See Moreland v. State*, 207 Md. App. 563, 572 (2012) ("'[A] lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than the jury'") (quoting *Robinson v. Colorado*, 927 P.2d 381, 382 (Colo. 1996)); *see also Tobias v. State*, 37 Md. App. 605, 616-17 (1977) ("We find no abuse of discretion in allowing the authenticating witness to identify the people shown in

the video tape . . . . The jury saw the tape, and could judge for itself what it showed and whether Detective Battle's identifications were accurate"). Indeed, in addition to identifying appellant as the culprit, another purpose of Thompson's testimony was to explain the timeline of pertinent events. This included Thompson's personal observations as well as the observations he made while watching the live footage, including when the door to the maintenance room was open and closed. Thompson also provided descriptions of the layout of the fourth floor from the video evidence, including the location of the maintenance room. The trial court's decision to permit Thompson's narration of the video was within its discretion because that testimony was helpful to the jury.

Likewise, similar conclusions can be reached about Corporal Reid's and Officer Mason's testimony. Although Corporal Reid did identify appellant on the video, that testimony was qualified by Reid's observation that the person depicted was wearing the same clothes as the person he saw in the maintenance room being detained by Thompson. Officer Mason's testimony also helped establish the chronology of events. Arguably, given appellant's concern about "time gaps" in the video sequencing, we are unable to conclude that the court abused its discretion in permitting this unobjected-to testimony by Officer Mason.

In any event, to the extent preserved, we also conclude that any error in admitting the surveillance tapes and accompanying narration by the State's witnesses was harmless beyond a reasonable doubt. It is well established that "[a]n error is harmless when a reviewing court is 'satisfied that there is no reasonable possibility that the evidence

complained of - whether erroneously admitted or excluded – may have contributed to the rendition of the guilty verdict.'" *Dionas v. State*, 436 Md. 97, 108 (2013) (quoting *Dorsey v. State*, 276 Md. 638, 659 (1976)); *accord Clark v. State*, 218 Md. App. 230, 241-42 (2014). Here, the jury heard maintenance employee Thompson's direct observations of appellant lurking near the locked door to the maintenance room and then inside that room without permission. There was also evidence presented that appellant, when apprehended, possessed property of the Holiday Inn and its staff. Accordingly, we hold that any error was harmless beyond a reasonable doubt.

II.

As will be set forth in more detail, appellant next asserts the court erred in admitting hearsay from Corporal Reid and Sean Hawbecker. The State responds that these issues are not preserved and harmless in any event. We agree with the State.

As for Corporal Reid, appellant asserts that Corporal Reid's testimony that he was told that the door to the maintenance room was locked was not only hearsay but amounted to prejudicial error. By way of background, earlier during Reid's direct examination, the court sustained an objection and struck testimony from Corporal Reid that he was told by Holiday Inn employees that the door to the maintenance room was normally locked. Thereafter, during cross-examination, Corporal Reid agreed that he did not see any damage to the maintenance room door, did not dust for fingerprints or collect DNA, and did not actually see appellant enter that room.

Then, during redirect examination and as cited by appellant, Corporal Reid testified as follows:

> Q. There being lack of damage done to the door – actually, strike that, Your Honor. I'll ask another way. How would the fact of there not being damage observed on the door affect your investigation of the breaking and entering of the store room of the Holiday Inn?
>
> A. Well, I was advised that the door is normally kept locked.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: I'll allow it. Overruled.
>
> THE WITNESS: I was advised that the door is normally kept locked. It's normally only accessible to Holiday Inn staff members.

The State does not dispute that this testimony was based on inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "Except as otherwise provided by these rules or permitted by applicable constitutional provisions or statutes, hearsay is not admissible." Md. Rule 5-802. *Accord Baker*, 223 Md. App. at 760 (also observing that a trial court's legal conclusions whether evidence is hearsay is considered *de novo*, while factual findings are reviewed for clear error). Under these definitions, we concur that the officer's testimony that he was told by an unidentified individual that the door was normally locked, in this burglary prosecution, was based on an out-of-court statement, offered to prove the truth of the matter asserted, *i.e.*, hearsay.

The State, however, argues that reversal is not required because similar testimony came in without objection. Whether characterized as a problem of waiver, or as harmless error, there are numerous cases that support the State's position. For instance, in *Yates v.*

State, 429 Md. 112, 120-21 (2012), the Court of Appeals stated: "Where competent evidence of a matter is received, no prejudice is sustained where other objected to evidence of the same matter is also received." (citation and internal quotation marks omitted); *see also DeLeon v. State*, 407 Md. 16, 30-31 (2008) (holding that a defendant waived an objection to what he claimed was irrelevant and highly prejudicial testimony about his purported gang affiliation because "evidence on the same point [was] admitted without objection" elsewhere at trial); *Carpenter v. State*, 196 Md. App. 212, 230-31 (2010) (explaining that error in admission of evidence is harmless when "'the cumulative effect of the properly admitted evidence so outweighs the prejudicial nature of the evidence erroneously admitted that there is no reasonable possibility that the decision of the finder of fact would have been different had the tainted evidence been excluded'" (quoting *Ross v. State*, 276 Md. 664, 674 (1996))).

Here, three witnesses other than Corporal Reid all testified, without objection, that the door to the maintenance room was either normally locked, or was locked, prior to appellant's unlawful entry. Thompson explained that these doors had an automatic closer attached to them and, at the time, were "secure" and "closed." Hawbecker testified, without objection, that the door to that room was "secured and locked." Officer Mason testified, without objection, that he was told by an employee of the hotel that the room where appellant was found was locked. Therefore, we are persuaded that appellant was not prejudiced by the admission of cumulative evidence on the same topic by Corporal Reid.

Appellant's second hearsay challenge is based upon testimony from Sean Hawbecker. Hawbecker testified that he entered the maintenance room and saw Thompson restraining someone that Thompson "found" inside. The State agrees that this amounted to hearsay, but that its admission was harmless considering Thompson's cumulative testimony on the same matter.

Initially, we are not convinced that the testimony was hearsay and do not agree wholeheartedly with the State's concession. *See Greenstreet v. State*, 392 Md. 652, 667 (2006) ("[A] party may not concede a point of law to the exclusion of appellate review, as necessary and proper to decide the case"). As this Court has stated, "[g]enerally, an out-of-court statement is admissible as non-hearsay if it is offered for the purpose of showing that a person relied and acted upon the statement, rather than for the purpose of showing that the facts elicited in the statement are true." *Morales v. State*, 219 Md. App. 1, 11 (2014) (citing *Purvis v. State*, 27 Md. App. 713, 716 (1975)). Here, Hawbecker testified as follows:

> Q. And when you responded to the maintenance room on the fourth floor what did you observe?
>
> A. I observed Mike Thompson restraining and individual that had – he had found in the maintenance room.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Well, I'll allow it. Overruled.
>
> BY [THE PROSECUTOR]:
>
> Q. And what did – what happened – what did you do, what did you see when you got there?

A. I saw, you know, Mike Thompson –

Q. Um-hum.

A. – holding someone to the ground. They found keys, screwdriver –

[DEFENSE COUNSEL]: Objection.

THE COURT: Just wait for the next question.

THE WITNESS: I – I –

THE COURT: Just wait for the next question.

THE WITNESS: Okay.

BY [THE PROSECUTOR]:

Q. Okay. And, so, after you saw Mr. Thompson holding someone to the ground what did you then do?

A. I went out to the roof to wait for the police officers.

An argument can be made that Hawbecker's testimony that he saw someone Thompson found was not admitted for its truth, but as a foundation to show what Hawbecker did following that revelation. In that case, it was non-hearsay and was admissible.

In any event, we agree that the admission of this evidence was harmless beyond a reasonable doubt. Thompson offered details of when he discovered appellant inside the maintenance room, testifying, as follows:

I went – proceed, swipe my card, open the door, hit the door and said, "Oh, Mike, I'm sorry." Then I realized it wasn't Mike. I said, "Oh, you're not Mike." He's standing there with a screwdriver in his hand. I took him to the ground.

Thompson also testified, without objection, that he "called Mike and let him know that I just caught somebody breaking into the shop." He further testified that after this incident, he mounted a steel flat plate over the locks on the door because "he broke into the shop." Additionally, further testimony on the same matter came in from Corporal Reid, without objection, when Reid testified that he was advised by communications that "a maintenance worker had caught a suspect in a maintenance room and had him detained and was holding him to the ground waiting for our arrival." We are satisfied that any error in admitting Hawbecker's testimony was harmless beyond a reasonable doubt.

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