UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2568

September Term, 2014

WILLIE LEE PARKER

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Thieme, Raymond G., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: August 3, 2016

After representing himself before a jury in the Circuit Court for Washington County, Willie Lee Parker was convicted on December 16, 2014 of several charges relating to the possession and distribution of heroin and cocaine. The court imposed a ten-year sentence for distribution of heroin and a consecutive ten-year sentence for possession of heroin with intent to distribute. Mr. Parker contends on appeal that the trial court failed to conduct the waiver inquiry required by Maryland Rule 4-215, that the court erred in certain evidentiary decisions, that the evidence was insufficient to sustain a conviction for possession of drug paraphernalia, and that two of his convictions should merge. We disagree and affirm.

I. BACKGROUND

On January 13, 2014, a student at the Hagerstown branch of the Pittsburg Institute of Aeronautics overdosed on heroin. The victim named another student, Carl Thumel, as the man who had provided heroin to him. When police questioned Mr. Thumel, *he* identified Mr. Parker (who also went by the nickname "Tennessee") as *his* source for the heroin. Police agreed not to charge Mr. Thumel in exchange for his cooperation and, that same day, directed Mr. Thumel to call Mr. Parker to arrange a heroin purchase. They dropped Mr. Thumel off at Mr. Parker's apartment that night; he wore a wire and had eighty dollars of pre-recorded task force funds to exchange for drugs. The transaction went smoothly, and the Hagerstown Police Department obtained a search warrant for Mr. Parker's apartment based on the heroin recovered from Mr. Thumel.

Police executed the search warrant later that night, and Sergeant James Robison, a Hagerstown Police Department officer, arrested Mr. Parker. In the course the subsequent search incident to arrest, two pieces of what was later determined to be crack cocaine fell to the floor. Police also found on Mr. Parker's person $351 in cash and the $80 in pre-recorded currency he'd gotten from Mr. Thumel.

Agent Jay Mills of the Washington County Narcotics Task Force would later testify to the search he conducted in Mr. Parker's apartment. The following items were marked for identification during the course of his testimony, and Jeffrey Kercheval, also of the Hagerstown Police Department, confirmed that certain items contained controlled dangerous substances:

- Seven wax paper packs containing heroin;
- Four unsealed wax paper packs containing heroin;
- Scotch tape, probably used to seal the wax paper packs;
- Two plastic bags containing cocaine residue;
- A knife, found on the dining room floor, and probably used to cut the wax;
- Loose wax paper;
- A black digital scale, found in a bedroom dresser;
- A pack of rolling papers recovered from a bedroom dresser;
- A smoking device with cocaine and marijuana residue, which the State collected and photographed next to a number of unidentified pills (which were not themselves admitted into evidence);

- Two cell phones found in the bedroom;
- One cell phone found in the living room.

Agent David Fortson of the Washington County Sherriff's Office also testified as an expert in distribution and trafficking of controlled dangerous substances, and opined that based on the evidence, "there was indication to distribute heroin" at Mr. Parker's apartment.

Mr. Parker was charged with possession of heroin with intent to distribute, possession of cocaine with intent to distribute, possession of heroin, distribution of heroin, possession of cocaine, and possession of drug paraphernalia. He was initially appointed a public defender, who represented him through an unsuccessful motion to suppress the search warrant. However, Mr. Parker later asked to discharge his public defender, explaining to the court that counsel was ineffective because he had failed to make the arguments that Mr. Parker wanted him to make and to submit the filings that Mr. Parker requested. The court found Mr. Parker's request non-meritorious, but agreed to allow him to discharge counsel, acknowledging that Mr. Parker had an absolute right to do so. The court informed Mr. Parker that he would not be appointed another public defender, that he would be responsible for either representing himself or hiring a private attorney, and that trial would continue as scheduled.

At trial on October 7, 2014, Mr. Parker represented himself *pro se*. However, that trial ended in a mistrial after Mr. Parker brought to the court's attention that he had not received complete discovery from the state, specifically the video from the wire Mr. Thumel wore during the transaction on January 13. Mr. Parker's discharged attorney

testified that he had no specific recollection of showing the surveillance footage to Mr. Parker.

Mr. Parker continued to represent himself at retrial. After the State presented its case, he moved unsuccessfully for acquittal, arguing that the evidence against him was insufficient because no police officer had actually seen him distribute drugs, and that the only person who did see the sale, Mr. Thumel, was high at the time. Mr. Parker then testified in his own defense, explaining that Mr. Thumel came by his apartment on January 13 only to ask him about a mutual acquaintance, Willie Branch, after which Mr. Thumel left.[1] He denied that he had sold drugs to Mr. Thumel, attacked Mr. Thumel's credibility, and posited that the police officers were prejudiced against him because of a prior case. Ultimately, Mr. Parker's theory was that he was taking the fall for Mr. Thumel, who was the culpable party in selling heroin to the student who overdosed. After rebuttal, Mr. Parker renewed his motion for acquittal without argument.

A jury convicted Mr. Parker of distribution of heroin, possession of heroin with intent to distribute, possession of heroin, possession of cocaine, and possession of drug paraphernalia with the intent to use it. The court sentenced him to ten years' incarceration for distribution of heroin; ten years, to be served consecutively, for possession with intent to distribute; and two years' incarceration for possession of cocaine. The court merged the sentence for possession of heroin into the sentence for possession with intent to distribute,

[1] On rebuttal, Mr. Thumel disagreed that he had simply stopped by Mr. Parker's house to ask him a question, and actually could not recall whether he had asked Mr. Parker about Mr. Branch that night.

and did not sentence Mr. Parker for possession of drug paraphernalia. We will provide additional facts as necessary to our analysis below.

II. DISCUSSION

On appeal, Mr. Parker *first* attacks the court's handling of his request to discharge counsel, and, *second*, contends that the court should not have admitted several of the State's exhibits. *Next*, he argues that the evidence was insufficient to support his conviction, and, *finally*, that the circuit court should not have imposed separate sentences for distribution of, and then possession with intent to distribute, heroin. We take his claims in order.[2]

A. The Circuit Court Did Not Violate Maryland Rule 4-215.

First, Mr. Parker contends that the circuit court erred by failing to follow Md. Rule 4-215, which defines the procedure when a defendant wishes to waive his Sixth Amendment right to counsel. Specifically, he argues that the circuit court violated Rule 4-215(a)(1) by failing to provide Mr. Parker a copy of the charging document, and violated

[2] Mr. Parker phrases the questions as follows:

1. Did the circuit court violate Md. Rule 4-215?

2. Did the circuit court err in admitting State's Exhibit 17, State's Exhibit 21, and three cell phones (State's Exhibits 28, 29, and 38?)

3. Was the evidence insufficient to sustain the conviction for drug paraphernalia?

4. Did the circuit court err in imposing separate sentences for distribution of heroin and possession with intent to distribute heroin?

Rule 4-215(a)(4) by failing to conduct the necessary "waiver inquiry" to ensure that he knowingly waived counsel. Moreover, Mr. Parker argues that even if the court technically complied with (a)(1) and (a)(4), it did so in an overly piecemeal fashion that ran afoul of the principles articulated in *Broadwater v. State*, 401 Md. 175 (2007), and invalidated the waiver itself.

Just as a criminal defendant has a constitutional right to counsel, he also has a constitutional right to proceed without counsel. *Faretta v. California*, 422 U.S. 806, 807 (1975). Rule 4-215 "provides an orderly procedure to insure that each criminal defendant appearing before the court be represented by counsel, or, if he is not, that he be advised of his Sixth Amendment constitutional right to the assistance of counsel, as well as his correlative constitutional right to self-representation." *Broadwater*, 401 Md. at 180-81 (quoting *Wright v. State*, 48 Md. App. 185, 191 (1981)). The rule functions as a roadmap for the trial court, safeguards the defendant's constitutional right to counsel, and provides the defendant with the information he needs to make an informed decision on self-representation. *Brye v. State*, 410 Md. 623, 626 (2009). The first subsection of the Rule sets forth the procedure when the defendant first appears without counsel:

> (a) **First Appearance in Court Without Counsel.** At the defendant's first appearance in court without counsel, or when the defendant appears in the District Court without counsel, demands a jury trial, and the record does not disclose prior compliance with this section by a judge, the court shall:
>
> (1) Make certain that the defendant has received a copy of the charging document containing notice as to the right to counsel.

> (2) Inform the defendant of the right to counsel and of the importance of assistance of counsel.
>
> (3) Advise the defendant of the nature of the charges in the charging document, and the allowable penalties, including mandatory penalties, if any.
>
> (4) Conduct a waiver inquiry pursuant to section (b) of this Rule if the defendant indicates a desire to waive counsel.

Md. Rule 4-215(a).[3] To find a waiver, the court must find that the defendant received all of the Rule 4-215(a) advisements. *Broadwater*, 401 Md. at 181. Waiver can be accomplished in four separate ways: "The right to counsel may be waived expressly, by inaction in the District Court, by inaction in the Circuit Court, or by discharge of counsel." *Id.* This is an express waiver case, so the two relevant subsections are (b) and (e):

> (b) **Express Waiver of Counsel.** If a defendant who is not represented by counsel indicates a desire to waive counsel, the court may not accept the waiver until after an examination of the defendant on the record conducted by the court, the State's Attorney, or both, the court determines and announces on the record that the defendant is knowingly and voluntarily waiving the right to counsel. If the file or docket does not reflect compliance with section (a) of this Rule, the court shall comply with that section as part of the waiver inquiry. The court shall ensure that compliance with this section is noted in the file or on the docket. At any subsequent appearance of the defendant before the court, the docket or file notation of compliance shall be prima facie proof of the defendant's express waiver of counsel. After there has been an express waiver, no postponement of a scheduled trial or hearing date will be granted to obtain counsel unless the court finds it is in the interest of justice to do so.

[3] Note that the waiver inquiry required by Rule 4-215 subsection (a)(4) is that described by subsection (b), the same procedure as when a defendant seeks to waive counsel expressly.

* * *

> (e) **Discharge of Counsel—Waiver.** If a defendant requests permission to discharge an attorney whose appearance has been entered, the court shall permit the defendant to explain the reasons for the request. If the court finds that there is a meritorious reason for the defendant's request, the court shall permit the discharge of counsel; continue the action if necessary; and advise the defendant that if new counsel does not enter an appearance by the next scheduled trial date, the action will proceed to trial with the defendant unrepresented by counsel. If the court finds no meritorious reason for the defendant's request, the court may not permit the discharge of counsel without first informing the defendant that the trial will proceed as scheduled with the defendant unrepresented by counsel if the defendant discharges counsel and does not have new counsel. If the court permits the defendant to discharge counsel, it shall comply with subsections (a)(1)-(4) of this Rule if the docket or file does not reflect prior compliance.

The advisements may, however, be given in a piecemeal fashion "by a court or courts over multiple encounters with a defendant, and [] judges may supplement the advisements omitted or incorrectly given by their predecessors." *Broadwater*, 401 Md. at 201. The rule also allows for different judges to give different parts of the required advisements, so long as all the advisements are eventually given. *See id.* at 200 ("[A] Circuit Court judge may rely on the advisements of other circuit court judges in a case to complete a Rule 4-215 litany, necessarily filling in only the gaps in the litany from prior appearances."). That said, the requirements of Rule 4-215 are mandatory, and although *Broadwater* permits courts some leeway in how the advisements are delivered, it "did not relax, in any way, the[ir] mandatory nature." *Brye*, 410 Md. at 637. If the circuit court failed to deliver all advisements required by the Rule, we must reverse the convictions. *Brye*, 410 Md. at 442; *Broadwater*, 401 Md. at 183.

In a perfect world, the Rule 4-215 advisements and the court's finding of a knowing and voluntary waiver would occur in a compact, linear fashion. But real-life trial practice doesn't always follow the script; like *Broadwater*, this is a case in which the Rule 4-215 advisements were not delivered together, but were delivered instead in pieces over the course of the proceedings leading up to Mr. Parker's second trial. As a result, we must look closely to ensure that Mr. Parker in fact received all of the Rule 4-215 advisements and when. And he did, all before the court made the formal finding at the outset of his second trial that he was waiving counsel knowingly and voluntarily:

- July 24, 2014, Trial #1, pre-trial hearing: After denying a previously-litigated motion to suppress, counsel advised the court that Mr. Parker wished to discharge his counsel. The court gave Mr. Parker a copy of Rule 4-215, advised him of the importance of counsel and how an attorney could be helpful, and informed him that if he discharged his public defender, he would have to represent himself or hire private counsel.
- August 19, 2014, Trial #1, status hearing: Mr. Parker argued that he would like to discharge counsel on the grounds that his public defender was ineffective, but that he could not afford to hire private counsel. The court found that his claim was non-meritorious, discharged counsel, and informed Mr. Parker that trial would take place as scheduled on October 7.

- October 7, 2014, Trial #1: At the start of proceedings, with a different judge presiding, [4] Mr. Parker confirmed on the record that he would be representing himself. The trial ended in a mistrial after Mr. Parker brought to the court's attention that he had not received complete discovery from the State. The court ordered the State to provide Mr. Parker with a complete copy of its discovery before the next trial date.
- October 28, 2014: The State filed written notice that it complied with the court's order by hand-delivering a copy of its discovery to Mr. Parker. Attached to the notice was an itemized list of all the documents the State had provided that included the criminal information statement and the notice of advice of right to counsel.
- December 1, 2014, Trial #2, status conference: The State confirmed that all discovery had been turned over to Mr. Parker, and Mr. Parker acknowledged that he had received everything except reports prepared by officers who would be witnesses in the case.
- December 9, 2014, Trial #2, hearing: The court advised Mr. Parker of the maximum penalties for each charge.
- December 16, 2014, Trial #2: Prior to the start of proceedings, the court stated on the record that "I find that your desire to represent yourself is made knowingly and

[4] The first two pre-trial hearings and the December 9 hearing were presided over by a different judge than the judge who presided over the remainder of the proceedings.

voluntarily," then asked Mr. Parker again whether he wished to be tried by the court or by a jury. He opted for a jury, which found him guilty on all charges.

Mr. Parker disputes that the circuit court provided him a copy of the charging document prior to discharging counsel, as required by Rule 4-215(a)(1). And if we were to confine our analysis to the initial trial, he'd be right. At the start of his first trial, which was Mr. Parker's first appearance in court after his public defender had been discharged, the court had not asked Mr. Parker if he'd received a copy of the charging document, and we cannot find anything in the record confirming that he received it at that point.[5] Nor does the State suggest that the court satisfied subsection (a)(1) until *after* the mistrial on October 28, when the State confirmed that it handed over all discovery, including the charging document at issue.

But the critical moment for our purposes is not the start of the first trial on October 7, but the start of Mr. Parker's *retrial* on December 16. Any defect in the process of considering Mr. Parker's request to discharge counsel during the initial trial was not appealable, because no final judgment was entered against Mr. Parker as a result of that trial. *Cf. State v. Fennell*, 431 Md. 500, 514-15 n.8 (2013) ("Ordinarily, absent a final judgment, the issue of whether a mistrial was granted properly is not appealable, unless the

[5] In *McCracken v. State*, the court inferred that the trial judge made certain the defendant received the charging document by consulting forms preserved in the record, including a Bail Summary Review Form. 150 Md. App. 330, 348 (2003). The record here does not allow us to make an equivalent inference, and although Mr. Parker's Bail Summary Review Form provides a space to check off that Mr. Parker received a copy of the charging document, that space is blank.

State attempts to re-prosecute the defendant on those counts . . . ."). But even it had been appealable (and appealed), he ended up in the same position: he would have been entitled to a new trial, which is what he received by virtue of the court's decision to declare a mistrial.

When Mr. Parker entered the courtroom on retrial without a lawyer, the court's obligation under Rule 4-215 was no longer to consider a request to *discharge* counsel under subsection (e)—counsel had been discharged on August 19—but rather to weigh Mr. Parker's request for an *express waiver* of counsel under subsection (b),[6] implicated when a defendant who is not represented by counsel indicates a desire to waive counsel. In order to find that Mr. Parker was waiving counsel knowingly and voluntarily, the court was required *first* to "announce[] on the record that the defendant is knowingly and voluntarily waiving the right to counsel," and *second* to give the subsection (a) advisements if the record did not reflect they'd already been given. Md. Rule 4-215(b).

The record reveals that the court complied with all of those requirements, including those in subsections (a)(1) and (a)(4) that Mr. Parker contends were never given. With regard to subsection (a)(1), Mr. Parker received a copy of the charging document no later than October 28 when the State hand-delivered it to him, along with the rest of discovery, before his second trial. Mr. Parker confirmed before the circuit court on December 1 that he'd received that discovery, and the charging document was among the materials listed.

[6] The State is not arguing that Mr. Parker waived his right to counsel by inaction. *See* Md. Rule 4-215(c) and (d).

It is true, as Mr. Parker points out, that the court never explicitly confirmed that he'd received a copy of the charging document. But compliance with this requirement can be inferred from the record, *see McCracken v. State*, 150 Md. App. 330, 348, 352 (2003) (finding that the court complied with Md. Rule 4-215(a)(1) when a "Bail Review Form," filed in the record and signed by the presiding judge, indicated via a checkmark that the defendant had been given a copy of the charging document), and the record here amply satisfies this standard.

From there, subsection (a)(4) calls for the court to conduct a waiver inquiry pursuant to subsection (b). In a waiver hearing, the court must explore whether the defendant's request to waive his right to counsel is made voluntarily and with full knowledge of the consequences of the decision. *State v. Westray*, 444 Md. 672, 686 (2015). As a general matter, the court should then fulfill the "determine and announce" requirement of (b) by stating for the record that the decision is knowing and voluntary. *See id.* (finding that a court's failure to state that the decision to discharge counsel under Md. Rule 4-215(e) was knowing and voluntary is waived if counsel fails to make a contemporaneous objection). But the heart of the rule lies with the court's obligation to explore with the defendant whether the decision to waive counsel is informed, and is truly his or her own.

After receiving confirmation from Mr. Parker, the court stated for the record before the retrial began its finding that Mr. Parker's decision to represent himself was made knowingly and voluntarily. No more detailed inquiry was needed at that time, because the court had already conducted the relevant inquiry at the July 29 pre-trial hearing. There, the court ensured that Mr. Parker's decision to waive counsel was his own, and that he

understood the consequences of his decision, by informing Mr. Parker that he could not pick another public defender should he choose to discharge the one he was assigned; that should he choose to represent himself he would be held to the same standards as an attorney; and that he would not get any help in performing the functions that clients usually leave to their lawyers, like selecting a jury or preparing jury instructions. The court also gave Mr. Parker a chance to explain why he was dissatisfied with his public defender's performance, and advised him that an attorney's expertise and experience would be helpful.[7] Because this colloquy had already been conducted on the record, the court's question to Mr. Parker about his intent to represent himself at retrial served to confirm his intentions before the court found that Mr. Parker's waiver of counsel was knowing and voluntary. *Broadwater*, 401 Md. at 201. And we disagree that the court failed to engage in any meaningful inquiry as to how knowing and voluntary Mr. Parker's waiver really was—although Mr. Parker's exchange with the court on the morning of the second trial did not reprise the issues, the colloquies between the court and Mr. Parker on July 24 and August 19 demonstrated that Mr. Parker's wish to waive counsel "was truly his own decision," *Westray*, 444 Md. at 686, and the court was not required to ask any specific question before finding that the waiver was knowing and voluntary. *See, e.g., Broadwater*, 401 Md. at 203 ("There is no prescribed or set form of inquiry that must precede a trial judge's finding of waiver under Rule 4-215(b)-(e).").

[7] The court also revisited all these statements at the August 19 hearing.

Finally, Mr. Parker contends that the Rule's required advisements were given in such a piecemeal and belated fashion that they ceased to be meaningful. Mr. Parker acknowledges that *Broadwater* allows a court to deliver the Rule 4-215(a) advisements in pieces, but contends that the advisements in this case are defective because they were given "months after the discharge of counsel and months after his first trial ended in mistrial." His timeline is correct, but *Broadwater* and its progeny recognize that circuit courts are owed "a degree of tolerance" in the manner in which they deliver the Rule 4-215 advisements. *Brye*, 410 Md. at 626. The critical question is whether Mr. Parker waived his Sixth Amendment right to counsel knowingly and voluntarily, and that he was in no way confused about his right or the perils of proceeding unrepresented. *Broadwater*, 401 Md. at 205. And the record, spanning from the first pre-trial hearings up until the start of retrial on December 16, confirms that Mr. Parker did waive his right to counsel knowingly and voluntarily:

Md. Rule 4-215	**Requirement (At Defendant's first Appearance in Court Without Counsel)**	**Date of Compliance**
(a)(1)	Make certain Defendant has received a copy of the charging document	10/28/14, confirmed 12/1/14 status conference
(a)(2)	Inform Defendant of the right to counsel and of the importance of the assistance of counsel.	7/24/14 pretrial hearing
(a)(3)	Advise Defendant of the nature of the charges and of the allowable penalties, including mandatory penalties, if any.	12/9/14 hearing
(a)(4)	Conduct a waiver inquiry pursuant to section (b) of this Rule	7/29/14, confirmed at retrial 12/16

It's true that the advisements were given over the course of several months, and that at the start of the initial trial on October 7, the court had not complied with either (a)(1), (a)(3), and possibly (a)(4). But that trial ended in a mistrial, and "[n]owhere in the Rule is there the hint that all of the advisements must be given in a single, omnibus hearing, in a continuous, uninterrupted recitation, in all situations." *Broadwater*, 401 Md. at 201-02. Viewed from the time of his retrial—the trial that led to the judgment before us—Mr. Parker had been given all the required advisements, and had made the choice to discharge counsel "with eyes open." *Brye*, 410 Md. at 636 (citations omitted).

B. The Contested Evidence Was Properly Admitted.

Mr. Parker argues *next* that the circuit court erred by admitting five separate State's exhibits that, he contends, were not relevant and amounted to prejudicial bad acts evidence, inadmissible under Md. Rules 5-403 and Rule 5-404. Specifically, he contests the court's decision to admit three pieces of evidence collected when police executed the search warrant: *first*, a smoking device containing marijuana and cocaine residue; *second*, a picture of that same smoking device next to some unidentified pills; and *third*, three cell phones found in the bedrooms and living room of Mr. Parker's apartment. The State counters that Mr. Parker failed to properly preserve his claims for appellate review by making timely and consistent objections to the admission of each of the contested exhibits. As we explain below, we agree with the State that Mr. Parker waived any objection to the picture of the smoking device. And we need not undertake a detailed waiver analysis for the smoking device itself or for the cell phones, because even if Mr. Parker had properly

objected, we agree with the circuit court that these exhibits were relevant, admissible evidence.

Relevant evidence is any evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Md. Rule 5-401. Trial judges generally have wide discretion when weighing the relevance of evidence, and whether evidence is relevant is a question of law that we review *de novo*. *State v. Simms*, 420 Md. 705, 724 (2011) (citing *Young v. State*, 370 Md. 686, 720 (2002)). However, the trial court does *not* have discretion to admit irrelevant evidence, including evidence of other bad acts, for the sole purpose of impugning the defendant's character. Md. Rule 5-404(b). And even if evidence is relevant, the court must exclude it if its probative value is substantially outweighed by the danger of unfair prejudice. Md. Rule 5-403. "Thus, we must consider first, whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403." *Simms*, 420 Md. at 725.

Mr. Parker takes issue with State's Exhibit 17, a multi-colored glass smoking device that contained marijuana and cocaine residue. Mr. Parker argues that the smoking device was not the basis for Mr. Parker's paraphernalia charge, and is therefore irrelevant. But Mr. Parker was also charged with possession of crack cocaine and possession with intent to distribute crack cocaine, and we see no reason to conclude that the smoking device was not relevant evidence to support those charges. Rather than being offered to show any of

Mr. Parker's prior bad acts or "reflect adversely upon [his] character," *Guiterrez v. State*, 423 Md. 476, 489 (2011) (quoting *Klauenberg v. State*, 355 Md. 528, 547-49 & n.3 (1999)), the evidence related to those acts for which he was tried, that is, possession of cocaine.

State's Exhibit 21, a picture of the same smoking device alongside unidentified pills which were themselves excluded from trial as irrelevant, and for which Mr. Parker was not charged, is more problematic. Had the picture depicted solely the smoking device it would be relevant, but the unidentified pills pictured next to it create the risk of prejudicing Mr. Parker, while simultaneously bearing no relationship to the charges. Mr. Parker waived any claim of error on this point, though, when he introduced this same picture in his case as a defense exhibit, albeit for a different purpose. "A party introducing evidence cannot complain on appeal that the evidence was erroneously admitted." *Brown v. State*, 373 Md. 234, 238 (2003) (quoting *Ohler v. United States*, 529 U.S. 753, 755 (2000)); *see also Cure v. State*, 421 Md. 300, 319 (2011) (affirming the general rule but allowing for a limited exception when the defendant preemptively testifies to a prior conviction after the court rules that it will allow the State to use that conviction for impeachment purposes); *Hillard v. State*, 286 Md. 145, 156 (1979), *abrogated on other grounds by Wright v. State*, 307 Md. 552 (1986) ("[A]dmission of improper evidence cannot be used as grounds for reversal where the defendant gives testimony on direct examination that establishes the same facts as those to which he objects."). Mr. Parker can't have it both ways—any error in introducing that photo in the State's case-in-chief was waived when he decided to introduce it for his own purposes in *his* case-in-chief.

State's Exhibits 28, 29, and 38 were cell phones collected from Mr. Parker's apartment. Mr. Parker argues that the cell phones were irrelevant because having multiple cell phones isn't in and of itself illegal, and the State failed to connect any of the phones to the transaction with Mr. Thumel. Moreover, Mr. Parker argues that the phones were prejudicial, and were meant to imply that Mr. Parker *must* be a drug dealer because he has multiple cell phones, without actually connecting the phones to any specific sale. Whether or not we as trial judges might have admitted them, though, the cell phones are probative of the charge of possession of heroin with intent to distribute, and corroborate Mr. Thumel's and Agent Hook's testimony that the controlled buy with Mr. Parker was set up via telephone. The cell phones were thus probative of the State's theory that Mr. Parker was distributing heroin, and we see no abuse of the court's discretion in overruling his objections to admitting them.

C. The Evidence Sufficed To Convict Mr. Parker Of Possession Of Drug Paraphernalia.

Mr. Parker argues *next* that we must vacate his conviction for possession of drug paraphernalia with an intent to use because the State's evidence was insufficient to show that the item upon which the charge was based, a digital scale, was in fact drug paraphernalia. The State counters that Mr. Parker's claim isn't preserved because when Mr. Parker moved for judgment of acquittal at the close of the State's case, and again after Mr. Parker presented his defense, he challenged the sufficiency of the State's evidence on the distribution charge, rather than the paraphernalia charge. Even assuming that Mr.

Parker had properly preserved his claim, however, we hold that the evidence was sufficient to convict him.

When deciding whether evidence is legally sufficient to sustain a conviction, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). We do not usurp the role of the fact-finder by re-weighing the evidence, but instead "seek to determine 'whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant's guilt . . . ." *Hale v. State*, 431 Md. 448, 466 (2013) (quoting *State v. Smith*, 374 Md. 527, 534 (2003)).

Here, the State was required to prove beyond a reasonable doubt that Mr. Parker intended to use the digital scale to process, package, or prepare a controlled dangerous substance. *See* Md. Code (2002, 2012 Repl. Vol., 2015 Supp.), § 5-619(c) of the Criminal Law Article. Mr. Parker argues that the evidence merely established the scale's presence in his apartment, and, absent any drug residue on the scale, was insufficient to support the State's theory that Mr. Parker used it to prepare or process a controlled substance. We disagree. The jury could infer that the scale, which was found in a dresser drawer in a bedroom, was used for the purposes of drug distribution, especially given the context of other items with which it was found: the scotch tape, the heroin folded into separate wax packets, and the knife. Additionally, jury members could rely on the testimony of Agent Forston, whom the court accepted as an expert in the field of distribution and trafficking

of controlled substances, that the evidence collected in the apartment, including the digital scale, indicated that Mr. Parker was distributing heroin. A reasonable juror could have concluded from this evidence that the scale was used as drug paraphernalia, rather than for any legitimate purpose, and it amply supports Mr. Parker's conviction on this count.

D. The Sentences Need Not Have Merged.

Finally, Mr. Parker argues that the circuit court improperly imposed separate sentences for Count 1, distribution of heroin, and Count 2, possession of heroin with intent to distribute. He argues that the sentences should be merged because, in his view, it is impossible to determine whether the jury based its guilty verdict for distribution and possession with intent to distribute, respectively, on the same acts or different acts. Mr. Parker contends that the circuit court should have instructed the jury that it needed to find a distinct act of distribution and a separate, distinct act of possession with intent to distribute in order to render two separate convictions.

Merger in Maryland is governed primarily by the required evidence test, also known as the *Blockburger* test from the Supreme Court's analysis in *Blockburger v. United States*, 284 U.S. 299 (1932).[8] Merger is required "if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element . . . ." *Snowden v. State*, 321 Md. 612, 617 (1991) (citing *State v. Jenkins*, 307 Md. 501, 517 (1986)). In such a case, the offenses merge and are deemed to be one crime, requiring only one

[8] In *Blockburger*, the Supreme Court held that a single act may be an offense against two statutes, *i.e.*, the offenses do not merge, if each statute requires proof of an additional fact which the other does not. 284 U.S. at 304.

sentence. *Id.* However, "[t]he required evidence test only applies 'where *the same act or transaction* constitutes a violation of two distinct statutory provisions.'" *Hawkins v. State*, 77 Md. App. 338, 348-49 (1988) (emphasis in original) (quoting *Blockburger*, 284 U.S. at 304). When "two crimes spawned from separate acts, *Blockburger* is not implicated," and the sentences need not merge. *Hawkins*, 77 Md. App. at 349. Here, merger is not required because Mr. Parker's sentences for distribution and possession with intent to distribute, respectively, were based on two different criminal transactions: the initial sale to Mr. Thumel and the subsequent search of his apartment uncovering heroin individually wrapped in wax packets.

Alternatively, Mr. Parker concedes that each conviction could have been predicated upon a distinct act, but argues the dual sentences must be vacated because court did not inform the jury explicitly in its instructions that it could only render two convictions if it found two distinct acts. "The burden of proving distinct acts or transactions for purposes of separate units of prosecution falls on the State. Accordingly, when the indictment or jury's verdict reflects ambiguity as to whether the jury based its convictions on distinct acts, the ambiguity must be resolved in favor of the defendant." *Morris v. State*, 192 Md. App. 1, 39 (2010) (citations omitted).

Mr. Parker is wrong, though, because the State met its burden. There was no ambiguity: the possession with intent to distribute charge was based on different conduct than the distribution charge. Mr. Parker attempts to bolster his argument with *Snowden v. State*, where, during the course of a robbery, the defendant shot a restaurant manager in the arm and then ordered him at gunpoint to take him where the money was kept. 321 Md. at

615. The defendant was convicted after a bench trial of both robbery with a dangerous weapon and assault and battery, and on appeal argued that the convictions should merge for sentencing purposes because they arose from the same transaction. *Id.* The State countered that separate sentences were appropriate because the initial shooting was a separate transaction from the subsequent robbery. The Court of Appeals resolved the ambiguity in favor of the defendant by merging the sentences, explaining that the fact-finder had not made a definitive finding as to whether one or two criminal transactions had occurred. *Id.* at 619.

Unlike *Snowden*, however, there was no suggestion at trial, during sentencing, or on appeal that these two charges stemmed from anything fewer than two criminal transactions. Quite the contrary—the State first presented Mr. Thumel's testimony, describing the initial heroin purchase, and subsequently presented testimony from police officers describing the small wax packets of heroin in Mr. Parker's apartment. *See also Hawkins*, 77 Md. App. at 349 ("When an individual possesses an amount of heroin that could result in a future distribution, and when the same individual also distributes *another* quantity of heroin, he is punishable for both possession *and* distribution." (emphases added) (citations omitted)). We find that the court's instructions, which *first* informed the jury that Mr. Parker was charged with five different offenses, *next* instructed the jurors to "consider each charge separately and return a separate verdict for each charge," and *then* defined possession with intent to distribute and distribution as separate charges, ably communicated that separate

and distinct acts were necessary for each conviction, and we hold that separate sentences were appropriate.

JUDGMENT OF THE CIRCUIT COURT FOR WASHINGTON COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.