UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2143

September Term, 2014

TYRAY LAMAR VALENTINE

v.

STATE OF MARYLAND

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

JJ.

Opinion by Berger, J.

Filed: September 2, 2015

*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, Tyray Lamar Valentine, Jr. ("Valentine"), was charged in the Circuit Court for Kent County, Maryland, with two counts of distribution of cocaine, and related charges. A jury convicted Valentine of two counts of distribution of cocaine, two counts of possession with intent to distribute cocaine, and two counts of possession of cocaine. Valentine was subsequently sentenced to twenty years' incarceration, with all but ten years suspended, for the first conviction for distribution; and a consecutive sentence of twenty years' incarceration, with all but ten years suspended, for the second conviction of distribution, with the remaining counts merged. On appeal, Valentine presents three issues[1] for our review, which we have rephrased as follows:

1. Whether the circuit court erred in admitting evidence of Valentine's prior conviction.

2. Whether the circuit court erred in permitting witnesses to testify as to their degrees of certainty as to identifications they made.

3. Whether the circuit court erred in imposing separate sentences for two counts of distribution.

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[1] The issues, as presented by Valentine, are:

1. Did the trial court abuse its discretion in permitting the State to impeach Appellant with his 2002 conviction for distribution?

2. Did the trial court err in permitting multiple police witnesses to testify that on "a scale of 1 to 100," they were "100%" certain of their identifications of Appellant?

3. Did the trial court err in imposing separate sentences for each count of distribution?

For the following reasons, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately noon on August 28, 2013, Detective Sergeant Prendi Garcia, of the Maryland State Police, was working in an undercover capacity in Chestertown, Kent County, Maryland. Prior to entering that area, Detective Garcia met with other members of a drug task force, including Trooper Daniel Baxter and Trooper Billy Phillips, at the Chestertown Police Department. Trooper Phillips searched Detective Garcia's vehicle and person to make sure he did not have any controlled dangerous substances in his possession, and Detective Garcia was given $100 in money to use for the covert purchase of narcotics. Detective Garcia proceeded to the area near College and Calvert Streets, an area that was also being monitored by police on closed circuit television.

At around 12:38 p.m., as Detective Garcia turned from College Street onto Calvert Street, he saw a group of individuals standing nearby. Detective Garcia put four fingers up outside his window, indicating that he wanted to purchase $40 worth of crack cocaine. At that point, Valentine, who was wearing a camouflage shirt, shorts, and had dreadlocks, waved Detective Garcia over. When Valentine approached Detective Garcia's vehicle, Valentine noticed a camcorder near the center console. Valentine asked "what was up" with the camcorder, and whether Detective Garcia was with the police. Detective Garcia explained that he was unemployed and was trying to sell the camcorder. Valentine appeared

satisfied with Detective Garcia's response. Detective Garcia, however, confirmed that the camcorder was on and that it recorded a transaction with Valentine.

Valentine placed crack cocaine on the seat inside Detective Garcia's vehicle, and Detective Garcia, in turn, gave Valentine $40. Valentine stood close enough to Detective Garcia that Detective Garcia "could probably touch him because he put his face right into the window of the passenger's side." Detective Garcia identified Valentine in court as the person he bought crack cocaine from on the day, time, and place in question.

After the exchange, Detective Garcia left the area and informed his team that he had made a purchase and was proceeding to a predetermined location. The video of the transaction was played for the jury in court.

Detective Garcia then turned over the purchased drugs, and the remaining $60, to the drug task force. He then returned to the Chestertown Police Department and watched live footage of the same area where the aforementioned transaction transpired. In that live feed, Detective Garcia observed Valentine, still in the area, wearing shorts and the same camouflage shirt from earlier. Detective Garcia identified Valentine on that video as the same person that was involved in the earlier transaction.

At that time, Detective Garcia was informed by members of the drug task force that they recognized and knew Valentine by name. These individuals showed Detective Garcia a picture of Valentine, and Detective Garcia made another positive identification.

Near 2:00 p.m. the same day, the drug task force decided to return to the same area in order to make another controlled purchase of narcotics. Trooper Phillips again checked Detective Garcia's car and person and made sure that there was no CDS or extra money present. Detective Garcia testified that they were going to try and buy from a different individual and had no intent of purchasing from Valentine a second time.

When Detective Garcia returned to the area, this time at around 2:00 p.m., Valentine, who was wearing the same clothes as before, again waved him over as Detective Garcia was parking his vehicle. When Valentine came to Detective Garcia's passenger side window, Detective Garcia told him that the drugs from earlier were "light," but he nevertheless wanted to purchase another $20 worth of crack cocaine. After Valentine stated that he only had $40 worth of drugs, Detective Garcia agreed to purchase that amount. As before, after the sale, Detective Garcia met members of the drug task force at a predetermined location and turned over the crack cocaine that he had just purchased.

Again, Detective Garcia identified Valentine as the person he bought crack cocaine from at 2:00 p.m. on the same day in question. In addition, a video recording of this second transaction was played in court for the jury. Detective Garcia testified that he was 100% sure of his identification.

Deputy Sheriff Albert Piasecki, assigned to the Kent County Sheriff's Office, was present at the Chestertown Police Department during these events, and was watching the live feed on closed circuit television. Deputy Piasecki confirmed that he saw Valentine, wearing

a camouflage shirt and shorts, on that live feed. Deputy Piasecki testified that he knew Valentine from "prior dealings with him working as a correctional officer in Kent County Detention Center and prior dealings as a police officer with the Chestertown Police."

After Detective Garcia first identified Valentine as the individual from whom he purchased drugs, Deputy Piasecki printed a photograph of Valentine that he obtained from the Crime Star database. That photograph was shown to Detective Garcia. Deputy Piasecki testified that he was certain Valentine was the person on the live feed.

Trooper Phillips, assigned to the Kent County Narcotics Task Force, confirmed that he was part of the undercover operation on August 28, 2013. Trooper Phillips corroborated Detective Garcia's account of the events of that day, and testified that he maintained surveillance from a covert vehicle parked in an area where he could clearly see the transaction using binoculars.

When Detective Garcia first pulled his undercover vehicle into that area, at around 12:38 p.m., Trooper Phillips saw a male wearing a camouflage shirt approach Detective Garcia's vehicle. Trooper Phillips identified that individual as Valentine. Trooper Phillips testified, without objection, that he was familiar with Valentine. More specifically, Phillips testified, again, without objection, that there was an active warrant out for Valentine from the Maryland State Police Fugitive Warrant Task Force, and that he, Phillips, had seen pictures of Valentine, as well as Valentine himself, on prior occasions.

During the course of his surveillance, Trooper Phillips saw Valentine approach the passenger side of Detective Garcia's vehicle. Within 30 seconds to a minute, Valentine left the vehicle. Trooper Phillips subsequently met with Detective Garcia and Detective Garcia gave him an amount of crack cocaine, and returned $60 out of an initial disbursement of $100. The crack cocaine field tested positive for the presence of .20 grams of cocaine, a Schedule II CDS.

Trooper Phillips further testified that a second controlled buy transpired in the same part of Chestertown at 2:00 p.m. that same day. Again, while using binoculars from his covert location, Trooper Phillips saw Valentine, still wearing the same clothing as earlier in the day, approach the passenger side of Detective Garcia's vehicle, "just like the first time." Trooper Phillips was certain that the person who approached Detective Garcia's vehicle was Valentine. The substance purchased by Detective Garcia on this second occasion also tested positive for cocaine, Schedule II.

At around the time in question, Sergeant Daniel Baxter, Group Supervisor of the Kent County Narcotics Task Force, was at the Chestertown Police Department, watching the closed circuit live feed of the transaction. Sergeant Baxter saw Valentine on that transmission. Sergeant Baxter further testified, without objection, that he was familiar with Valentine. In fact, Baxter knew Valentine in childhood as they used to ride the school bus together.

While viewing the live feed, Sergeant Baxter saw Valentine, wearing a camouflage t-shirt and black shorts, approach Detective Garcia's vehicle. Afterwards, when Detective Garcia returned to the station, he identified Valentine as the individual from whom he purchased the narcotics. Sergeant Baxter also saw Valentine during the second transaction that day, engaged with Detective Garcia in approximately the same location where the first transaction occurred earlier that day. Valentine was wearing the same clothing he wore earlier.

Sergeant Baxter also confirmed that he tried to obtain copies of the surveillance videos from the Chestertown Police Department, but was unsuccessful. Sergeant Baxter also testified that the individual depicted in the videos was Valentine.

Valentine testified on his own behalf and denied that he sold crack cocaine to Detective Garcia on August 28, 2013. Valentine did not remember where he was on that day, and testified that he was not arrested in connection with this case until October 9, 2013. Valentine admitted he could have been in the area because he has three aunts that live nearby. Valentine agreed he had a prior conviction for distribution of cocaine.

On cross-examination, Valentine admitted he owned a camouflage t-shirt. Valentine denied knowing Sergeant Baxter, other than riding the school bus with him in fourth grade. He also claimed that Deputy Piasecki only had contact with him while he, Valentine, was incarcerated. Finally, when asked again whether he sold cocaine on the day in question, Valentine replied, "[o]ne hundred percent that wasn't me. I wasn't there."

We shall include additional detail in the following discussion.

DISCUSSION

I. Impeachment By Prior Conviction Was Not An Abuse of Discretion

Valentine first contends the court erred in permitting him to be impeached with a prior conviction for distribution from 2002 when he was on trial for the same crime. The State responds that the trial court properly exercised its discretion. We agree with the State.

Here, after appellant informed the court that he wanted to testify on his own behalf, the following ensued:

> [DEFENSE COUNSEL]: And at this point, again, it's, I think, the motion for limine becomes applicable, and I refer the Court to, specifically, Rule 5-609, and, specifically, termination. That if the crime was an infamous crime relevant to the witnesses' credibility and the Court determines that the probative value of admitting the evidence outweighs the danger of unfair prejudice to my client.
>
> THE DEFENDANT: Well, what crime specifically are you alluding to?
>
> [DEFENSE COUNSEL]: I'm referring to the crime he was charged with distribution, is that right, 2002, and –
>
> THE DEFENDANT: The same situation now – no video. They scared me, so I had no other choice but to take the plea. I was young. Same thing that's going on now. They say that I done something –
>
> THE COURT: Well, we're just going to –
>
> THE DEFENDANT: – but they have no proof.

> THE COURT: – we're going to talk, Mr. Valentine. We're just going to talk about what the crime was, not the details –
>
> [DEFENSE COUNSEL]: Right.
>
> THE COURT: – behind the crime.
>
> [DEFENSE COUNSEL]: The crime was distribution.
>
> THE COURT: Yeah –
>
> [DEFENSE COUNSEL]: A similar crime.
>
> THE COURT: – the crime was distribution.
>
> [DEFENSE COUNSEL]: Uh-huh.
>
> THE COURT: And the Court – if it's just a [sic] issue of distribution, it would seem to me it's an infamous crime, and the fact that it happens to be the same crime to which he's charged right now is nothing more than more probative than less probative and more important than less probative, I don't see any – it may prejudice him, but there's no undue prejudice. And the Court will allow that to take place.

Upon hearing further argument from defense counsel, the court clarified its ruling as follows:

> For the record, with regard to [Defense Counsel's] motion in limine, I'm going to refer to Rule 5-609, and alluding to the crime of distribution of CDS, I believe it's the nature of the crime that he was convicted of in 2002, I'm going to say that the crime was an infamous crime or crime certainly relevant to the witness' credibility, and I determine that the probative value of admitting this into the hearing and the jury in the way of an impeachment outweighs the danger of unfair prejudice to the witness where the objective [sic] party, which would be the Defendant, it seems to me it might be prejudicial, but not unfairly prejudicial.

> So I think that's fair game for cross-examination for purposes of credibility under Rule 5-609. . . .[2]

Maryland Rule 5-609 provides, in pertinent part:

> **(a) Generally.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or objecting party.
>
> **(b) Time limit.** Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction.

Here, there is no dispute that Valentines's 2002 conviction for distribution falls within the time limit allotted prior convictions under the rule. Moreover, the Court of Appeals has held that a prior conviction for distribution of cocaine is "relevant to credibility and as such is admissible for impeachment purposes . . . ." *State v. Giddens*, 335 Md. 205, 217 (1994) (stating that "[a] narcotics trafficker lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie" (citation omitted)).

The issue presented in this case is whether the probative value of the prior conviction was outweighed by the danger of unfair prejudice. We are mindful that, "[a]ppellate review

[2] Rather than offer this evidence on cross-examination, however, the defense made a tactical decision to elicit evidence of Valentine's 2002 conviction for distribution on direct examination.

of a trial court's application of the balancing test of Rule 5-609 is deferential." *King v. State*, 407 Md. 682, 696 (2009) (citing *Jackson v. State*, 340 Md. 705, 719 (1995)). Both parties rely on *Jackson, supra*, 340 Md. 705. In that case, the defendant was convicted of felony theft. *Jackson*, *supra*, 340 Md. at 708. The Court of Appeals considered whether prior convictions for offenses that are similar or identical to the charged crime are inadmissible *per se*, and whether the introduction of same-crime evidence for impeachment constituted an abuse of discretion. *Id*. at 707-08. A majority of the Court determined that the prosecution may use such evidence on cross-examination of the defendant. *Id*. at 16. In rejecting the defendant's contention that the trial court's decision to allow same-crime impeachment constituted an abuse of discretion *per se*, the Court explained that "[u]nder Rule 5-609, prior convictions for the same or similar offenses as the charged offense are not automatically excluded. The similarity between the prior conviction and the current charge is only one factor the trial court should consider in determining whether to admit the conviction." *Id*. at 711.

The Court of Appeals then held:

> that a prior conviction that is the same as or similar to the crime charged is not *per se inadmissible*, but is subject to the probative-prejudice weighing process under Rule 5-609. The balancing prong of the rule contains no language prohibiting the use of similar prior crimes. Furthermore, we believe a per se rule barring same-crime impeachment would deny trial judges needed flexibility. Establishing such a per se rule would have the additional undesirable effect of shielding a defendant who specializes in a particular crime from cross-examination regarding his specialty crimes. We therefore reject Appellant's

> contention that same-crime impeachment evidence is per se inadmissible.

Jackson, *supra*, 340 Md. at 714 (citations omitted).

The Court of Appeals further recognized the purpose of Rule 5-609 is:

> to minimize this danger of prejudice. The Rule is designed to prevent a jury from convicting a defendant based on his past criminal record, or because the jury thinks the defendant is a bad person. The Rule therefore imposes limitations on the use of past convictions in an effort to discriminate between the informative use of past convictions to test credibility, and the pretextual use of past convictions where the convictions are not probative of credibility but instead merely create a negative impression of the defendant.

Id. at 715-16 (citations omitted); *accord King*, *supra*, 407 Md. at 700.

The Court of Appeals prescribed five factors for courts to consider to aid them in balancing this type of evidence:

> These factors are (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility.

Jackson, *supra*, 340 Md. at 717 (citing *United States v. Mahone*, 537 F. 2d 922, 929 (7th. Cir. 1976), *cert. denied*, 429 U.S. 1025 (1976)); *see also King*, *supra*, 407 Md. at 701 n.9, 704 (extending these factors when a defendant seeks to impeach the testimony of a witness).

Valentine concedes that a prior conviction for distribution is an impeachable offense. With respect to the second factor, appellant contends that, whereas the prior conviction was 12 years old, its probative value was "greatly limited." Rule 5-609(b), however, by its text

expressly allows for prior convictions of such vintage. Moreover, an argument can be made that the age of the prior conviction limited the danger of unfair prejudice the jury may have inferred from Valentine's criminal history. Indeed, there was no other evidence before them, other than the fact of his four year incarceration from 2002 to 2006, that suggested any sort of criminal propensity on Valentine's part.

The third factor, *i.e.*, the similarity between the past crime and the charged crime, is one of significant dispute between the parties. Throughout this argument, Valentine avers that his case is controlled by *Dyce v. State*, 85 Md. App. 193 (1990). *Dyce* bears comparison to a later case, *Summers v. State*, 152 Md. App. 362, *cert. denied*, 378 Md. 619 (2003). In *Dyce*, Renauld Dyce was tried for possession of cocaine with intent to distribute. The State presented evidence at trial from two police officers, who observed Dyce selling cocaine to a third person in 1989. *Dyce*, *supra*, 85 Md. App. at 194.

Prior to Dyce taking the stand, the trial court ruled that his 1988 conviction for distribution of cocaine was admissible for impeachment purposes. Nevertheless, Dyce took the stand. He denied possessing or selling cocaine, and the State cross-examined him regarding the prior conviction. Dyce was ultimately convicted of possession of cocaine with the intent to distribute. *Id*. at 195-96.

We reversed on appeal, noting first that, at the time, distribution was not considered an infamous crime, but might be relevant to credibility. *Id*. at 199. We then held that because the crime for which Dyce was on trial was virtually identical to the crime for which

he had been previously convicted, the "probative value of [the prior conviction] was clearly outweighed by its prejudicial effect" and should have been excluded. *Id*. at 199-200.

In the later case of *Summers*, *supra*, 152 Md. App. 362, James Summers was charged with, among other things, possession with intent to distribute heroin, possession with intent to distribute cocaine, and simple possession of each of those narcotics. The State's theory was that, in 2001, three officers observed Summers selling heroin and cocaine to a line of people. The defense alleged that the officers were lying and that Summers, an admitted drug addict, was in line to buy, rather than sell, drugs. *Summers*, *supra*, 152 Md. App. at 367-68.

During trial, Summers moved to exclude evidence of a 2000 conviction for possession with the intent to distribute. He argued that the jury was likely to misuse the prior conviction because of its similarity to the current charges. Applying the five *Jackson* factors, the trial court ruled that, although the similarity between the two charges and the recentness of the prior conviction weighed against admissibility, it would allow the State to impeach Summers with the prior conviction because of the importance of his credibility to resolving the case - he was the only witness for the defense and his testimony was central. Summers was ultimately convicted of possession of heroin and possession of cocaine. *Id*. at 368-69.

Summers appealed his convictions arguing that the trial court abused its discretion in permitting the State to impeach him with a similar prior conviction. We disagreed, stating:

> We cannot say that the trial court abused its discretion in determining that appellant's prior conviction for distribution of a controlled dangerous substance was relevant to his credibility as a witness in this case. It is undisputed that appellant's credibility was central to the case, and that the jury's verdict would depend on whether it believed appellant or the police officers. Moreover, as the State points out, the jury was instructed that the conviction was to be used only to decide whether appellant was telling the truth, not "as any evidence that the Defendant committed the crime that's charged in this case."
>
> In these circumstances, the trial court properly exercised its discretion in concluding that "the probative value of the impeachment is great, and thus weighs heavily against the danger of *unfair* prejudice." *Jackson*, 340 Md. at 721, 668 A.2d 8 (emphasis in original).

Summers, *supra*, 152 Md. App. at 371.

While *Dyce* and *Summers* seem to conflict, we note that *Dyce* was decided before the Court of Appeals' decision in *Jackson*, and *Summers* was decided afterwards. Therefore, *Summers* employed the five *Jackson* factors in balancing the probative value of a prior similar conviction against the possibility of unfair prejudice. We are persuaded that *Summers* is compelling because, whereas *Dyce* employs a blanket prohibition, *Summers* requires balancing as mandated by *Jackson*. Accordingly, we will not exclude Valentines's prior conviction because of its similarity to the crime charged. Rather, we consider it a factor to be weighed in the overall analysis.

We recognize that, in contesting the third factor, Valentine cites the trial court's initial ruling and argues that the trial court "believed that the identical nature of the prior offense

made it more admissible." (emphasis omitted). The record demonstrates, however, that the court sufficiently understood its obligation to weigh the probative value of the prior, similar offense, against the danger of unfair prejudice. *See State v. Chaney*, 375 Md. 168, 179 (2003) ("trial judges are presumed to know the law and to apply it properly" (citation omitted)). Moreover, this conclusion is supported by the trial court's later clarification of its ruling, when it stated that "the probative value of admitting this into the hearing and the jury in the way of an impeachment outweighs the danger of unfair prejudice to the witness . . ."

Finally, with respect to the last two *Jackson* factors, *i.e.*, the importance of the defendant's testimony and the centrality of the defendant's credibility, as discussed in Part II, *infra*, all of the State's witnesses testified they were 100% certain that Valentine was the person seen selling cocaine to Detective Garcia. In contrast, Valentine testified on his own behalf and testified that he was 100% certain that he did no such thing. Under these circumstances, the importance of Valentine's testimony, and the centrality of his credibility, were critical factors that the jury needed to consider. *See Jackson*, *supra*, 340 Md. at 721 ("Where credibility is the central issue, the probative value of the impeachment is great, and thus weighs heavily against the danger of *unfair* prejudice" (emphasis in original)).

On balance, we conclude that the trial court did not err in its assessment in this case. Where credibility was a central issue, Valentine's prior conviction for distribution, an infamous crime, clearly had probative value in this case. That Valentine was on trial for distribution here, required the court to weigh the probative value of the similar previous

conviction against the danger of unfair prejudice. Under *Jackson* and its progeny, the trial court's admission of the prior conviction was a proper exercise of judicial discretion.

II. Admission of Testimony As To A Witness's Degree of Certainty Was Not Error

Appellant next asserts that the trial court erred in permitting multiple witnesses to testify they were 100% certain of their identification of appellant because such testimony was irrelevant, and, if relevant, the evidence was unfairly prejudicial. The State responds that, to the extent preserved, the trial court properly exercised its discretion in admitting the evidence.

At trial, Detective Garcia testified as follows:

> Q. Okay. And on a scale of 1 to 100 percent, what is your, what do you feel your accuracy of your identification of –
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Oh, well, overruled.
>
> BY [PROSECUTOR]:
>
> Q. How positive do you feel on the percentage scale of your identification of Mr. Valentine here in court today and as a person you bought the cocaine from twice on August 28th?
>
> A. Your Honor, members of the jury, I'm 100 percent sure that I bought twice on August 28th, 2013 from Mr. Valentine. There is no doubt about it. I bought twice from him.

Thereafter, Deputy Sheriff Albert Piasecki testified:

> Q. Okay. And are you – how sure are you on a scale of 1 to 100 that the person you saw on the closed circuit TV wearing those clothes with Mr. Garcia was Tyray Valentine?

A. I'm 100 percent sure.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. You can answer. A hundred percent?

THE WITNESS: Yes, sir.

Thereafter, Trooper Phillips testified as follows:

Q. And on a scale of 1 to 100 percent, what is your identification on Mr. Valentine?

A. 100 percent.

[DEFENSE COUNSEL]: Objection.

THE COURT: It's overruled.

Finally, Sergeant Baxter testified as follows:

Q. Okay. And you've been familiar with Mr. Valentine since the school bus. On a scale of 1 to 100, what's your accuracy in your identification of him on the 28th at the 400 block of High Street there?

A. Oh, without a doubt, 100 percent it was Tyray Valentine.

In only the one instance with respect to Detective Garcia did defense counsel object before the witness answered. Defense counsel's objections to Piasecki's and Phillips's testimony came after the answer, and defense counsel offered no objection whatsoever to Baxter's testimony. Maryland Rule 4-323(a) provides that, "[a]n objection to the admission

of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." Further, "it is fundamental that a party opposing the admission of evidence must object at the time that evidence is offered." *Klauenberg v. State*, 355 Md. 528, 545 (1999); *see also Bruce v. State*, 328 Md. 594, 628 (1992) ("Counsel cannot wait to see whether the answer is favorable before deciding whether to object." (citation omitted)), *cert. denied*, 508 U.S. 963 (1993); *Williams v. State*, 131 Md. App. 1, 42 (rejecting argument that "damage was done before the appellant had the chance to object" because counsel had opportunity to object before answer was given), *cert. denied*, 359 Md. 335 (2000). Given that counsel objected earlier to Detective Garcia's testimony, it was incumbent on counsel to offer timely objections when similar evidence, through similarly worded questions, was elicited. *See Williams v. State*, 99 Md. App. 711, 717 (1994) ("[I]f the objectionable nature of the question is clear, the objection must be immediately forthcoming before the answer is given"), *aff'd*, 344 Md. 358 (1996).

Moreover, assuming, *arguendo*, that Valentine's belated objections to Piasecki's and Phillips's answers were sufficient, as there was no objection when Sergeant Baxter testified to his level of certainty. We, therefore, conclude that Valentine waived his objection to this testimony. *See Yates v. State*, 429 Md. 112, 120-21 (2012) ("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)). Accordingly, due to the waiver, we conclude that this issue was not properly preserved for appellate review.

Furthermore, had this issue been preserved, we are persuaded that the evidence was relevant and admissible. "A ruling on the admissibility of evidence ordinarily is within the trial court's discretion." *Hajireen v. State*, 203 Md. App. 537, 552, *cert. denied*, 429 Md. 306 (2012). We review *de novo* a trial judge's finding that evidence is or is not relevant. *DeLeon v. State*, 407 Md. 16, 20 (2008). To be clear, after determining the relevance of evidence, the focus of our review turns to "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," under the abuse of discretion standard. *State v. Simms*, 420 Md. 705, 725 (2011).

Maryland Rule 5-401 provides, "'Relevant evidence' means 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." As the Court of Appeals has explained, "[r]elevance is a relational concept. Accordingly, an item of evidence can be relevant only when, through proper analysis and reasoning, it is related logically to a matter at issue in the case, *i.e.*, one that is properly provable in the case." *Snyder v. State*, 361 Md. 580, 591-92 (2000) (citations omitted). Further:

> The real test of admissibility of evidence in a criminal case is the connection of the fact proved with the offense charged, as evidence which has a natural tendency to establish the fact at issue . . . . [E]vidence, to be admissible, must be relevant to the

> issues and must tend either to establish or disprove them. Evidence which is thus not probative of the proposition at which it is directed is deemed irrelevant.

Sifrit v. State, 383 Md. 116, 128-29 (2004) (alterations in original) (quoting *Dorsey v. State*, 276 Md. 638, 643 (1976)).

In addition, if the proffered evidence is relevant, it may still be excluded under Maryland Rule 5-403. Indeed, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Md. Rule 5-403. "Evidence is prejudicial when 'it tends to have some adverse effect . . . beyond tending to prove the fact or issue that justified its admission.'" *Snyder v. State*, 210 Md. App. 370, 394-95 (alteration in original) (quoting *Hannah v. State*, 420 Md. 339, 347 (2011)), *cert. denied*, 432 Md. 470 (2013). Under the rule, however:

> Evidence is never excluded merely because it is 'prejudicial.' If prejudice were the test, no evidence would ever be admitted. The parties . . . have a right to introduce prejudicial evidence. Probative value is outweighed by the danger of '*unfair*' prejudice when the evidence produces such an emotional response that logic cannot overcome prejudice or sympathy needlessly injected into the case.

Moore v. State, 84 Md. App. 165, 172 (1990) (alteration in original) (emphasis in original) (quoting Murphy, *Maryland Evidence Handbook* § 506 (B), at 209 (4th ed. 2010)); *see also*

Odum v. State, 412 Md. 593, 615 (2010) ("The more probative the evidence is of the crime charged, the less likely it is that the evidence will be unfairly prejudicial").

Identification of a defendant in a criminal case is relevant to resolution of the underlying issues before the fact finder. *See Hopkins v. State*, 352 Md. 146, 163 (1998) (observing that a witness's "testimony as to the identity of the assailant, therefore, was material to the outcome and, as such, highly relevant"). The issue presented here does not concern the identification, *per se*, but rather, whether the witness's level of certainty was relevant. In support of his argument, Valentine cites several secondary sources that essentially stand for the general proposition recognized by the Supreme Court almost fifty years ago: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *United States v. Wade*, 388 U.S. 218, 228 (1967).

Yet, despite these legitimate concerns, in considering the reliability of an identification, it is the jury's province to consider the witness's level of certainty. Indeed, the pattern jury instruction on identification of a defendant, which was given to the jury in this case, makes clear that a witness's certainty or lack thereof is a relevant consideration. *See* Maryland State Bar Ass'n, *Maryland Criminal Pattern Jury Instructions* 3:30 (2012). This is so because, "[i]n a criminal case tried before a jury, a fundamental principle is that the credibility of a witness and the weight to be accorded the witness' testimony are solely within the province of the jury." *Conyers v. State*, 354 Md. 132, 153 (quoting *Bohnert v.*

State, 312 Md. 266, 277-78 (1988)), *cert. denied*, 528 U.S. 910 (1999); *see also Hopkins*, *supra*, 352 Md. at 166 ("[O]nce identification testimony has passed the threshold of relevance and reliability, issues affecting credibility of the in-court identification go to its weight, not its admissibility"); *State v. Hailes*, 217 Md. App. 212, 265 (2014) ("Any residual question as to the reliability of the identification is a matter to be fought out by examination and cross-examination and is ultimately to be resolved by the jury. It is quintessentially an issue of fact and not an issue of law"), *aff'd*, 442 Md. 488 (2015).

The State cites *Mines v. State*, 208 Md. App. 280 (2012), *cert. denied*, 430 Md. 346 (2013), and we agree that case is instructive. There, a witness testified that he "was a hundred percent sure" that appellant was the man who tried to rob him. *Mines*, *supra*, 208 Md. App. at 302. Mines argued this testimony was not relevant and was unfairly prejudicial. *Id*. After determining the issue was unpreserved and did not warrant plain error review, we addressed the argument in dicta, stating:

> [a] witness's degree of certainty is a proper consideration when evaluating his likelihood of misidentification. *See e.g.*, *Neil v. Biggers*, 409 U.S. 188, 200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) (stating that factors to be considered in evaluating the likelihood of misidentification include "the level of certainty demonstrated by the witness at the confrontation").

Mines, *supra*, 208 Md. App. at 302 (other citations omitted).

In this case, the witness's level of certainty was relevant and probative of a fact in issue, *i.e.*, the identification of Valentine as the perpetrator of the underlying crime. Moreover, we are persuaded that this probative value, especially in a case where identity was

contested, was not outweighed by the danger of unfair prejudice. The trial court properly exercised its discretion in admitting the evidence.

III. Imposition of Two Sentences Did Not Violate Double Jeopardy

Finally, Valentine contends that he was illegally sentenced to two separate sentences for distribution. The State responds that, whereas there were two separate acts of distribution, appellant was properly sentenced. We agree with the State.

"[C]hallenges to sentencing determinations are generally waived if not raised during the sentencing proceeding," *Bryant v. State*, 436 Md. 653, 660 (2014) (internal citations omitted), however, there is a limited exception to the rule. A petitioner can, under Maryland Rule 4-345(a), challenge his or her sentences without raising the challenge during the sentencing proceeding, because it allows the circuit court to "correct an illegal sentence at any time." Illegal sentences include sentences that violate the double-jeopardy clause of the Fifth Amendment of the United States Constitution. *State v. Griffiths*, 338 Md. 485, 496-97 (1995). Whether the double jeopardy clause has been violated is a question of law, which we review *de novo*. *Pair v. State*, 202 Md. App. 617, 625 (2011), *cert. denied*, 425 Md. 397 (2012).

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This constitutional guarantee is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *State v. Long*, 405 Md. 527, 535-36 (2008) (citing *Benton v.*

Maryland, 395 U.S. 784, 794 (1969)). The Double Jeopardy Clause "prohibits three distinct abuses: 1) the second prosecution for the same offense after acquittal; 2) the second prosecution for the same offense after conviction for that offense; and 3) the imposition of multiple punishments for the same offense." *Taylor v. State*, 381 Md. 602, 610 (2004); *accord State v. Long*, 405 Md. at 536.

The Court of Appeals has stated that the "double jeopardy analysis is a two-step process. We determine first whether the charges arose out of the same act or transaction, and second, whether the crimes charged are the same offense." *Jones v. State*, 357 Md. 141, 157 (1999); *accord Alexis v. State*, 209 Md. App. 630, 680 (2013), *aff'd*, 437 Md. 457 (2014). The State's argument is that there were two separate sales of cocaine, and thus, two separate acts.

Here, *Hawkins v. State*, 77 Md. App. 338 (1988), is instructive. In that case, a police officer observed the defendant make a hand-to-hand transaction with another man, taking a small packet out of a baggie and handing the packet to the man in exchange for currency. *Id*. at 341. The officer radioed an arrest team, described the transaction she had witnessed, and directed the team to arrest the defendant. *Id*. When the arresting officer approached, the defendant ran, discarding the baggie, which was later found to contain CDS. *Id*. at 341-42. The defendant was convicted of possession, possession with intent to distribute, and distribution of a CDS. *Id*. at 340.

On appeal, we held that, although the convictions for possession and possession with intent to distribute mandated merger, his convictions for possession with intent to distribute and distribution should not merge, as the latter arose from the completed hand-to-hand transaction the police officer witnessed and the former was based upon the defendant's separate possession of the CDS in the baggie. *Id*. at 349 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

Likewise, in the case *sub judice*, Detective Garcia bought cocaine from Valentine on two separate occasions. The fact the two transactions occurred at the same location is of no consequence. The first transaction occurred at around 12:38 p.m., and the second, entirely separate, transaction occurred at around 2:00 p.m. These were separate acts not subject to merger.

In his brief, appellant relies on *Snowden v. State*, 321 Md. 612 (1988). We are persuaded, however, that *Snowden* is not controlling. That case dealt with whether common law assault and battery merged with armed robbery. *Snowden*, *supra*, 321 Md. at 615. In that case, Snowden:

> and an accomplice approached the Romano's Restaurant in Glen Burnie with the intent to steal . . . . Upon hearing noises in the kitchen, the restaurant manager, Framouzis Stamidis, came from the office to the kitchen where he was immediately shot in the left arm by Snowden. Stamidis [was] then told to lie down on the floor. Snowden, while pointing his rifle at [Stamidis], . . . ordered Stamidis to take him to the money. Still at gunpoint, Stamidis led Snowden to the office where the money was located, and Snowden and his accomplice then left with $3000 taken from the restaurant.

Id. at 614-15. Snowden was later convicted of, *inter alia*, robbery with a dangerous and deadly weapon and assault and battery. *Id*. at 614.

On appeal, Snowden argued that, because "the two offenses arose from the same transaction[,] the lesser offense should merge into the greater." *Id*. at 615. The State responded that there were two separate crimes, one being the shooting of Stamidis in the arm, a battery; and the other being the robbery when Stamidis was ordered, at gunpoint, to take Snowden to the money. *Id.* The State asserted that "separate convictions for two offenses are proper if the lesser offense is not essential to effectuate the greater offense." *Id*. The Court of Appeals found fault with the State's argument, under the specific circumstances of the case:

> We are faced with a[n] ambiguity here. We do not know whether the robbery charged was based on battery as a lesser included offense or on assault as a lesser included offense with the battery considered separate. Snowden's was a court trial; had it been a jury trial we could have looked to the judge's instructions in hope of illuminating the rationale behind the verdicts. Because the case was tried by the court, we must look to the judge's rationale for the convictions. That rationale is not readily apparent to us, so . . . we are constrained to give [Snowden] the benefit of the doubt and merge his sentence for and conviction of assault and battery into those for the robbery charge. The fundamental principle of fairness in meting out punishment requires us to so hold.

Id. at 619 (citation omitted).

In relying on *Snowden*, Valentine argues that the court's instruction on distribution "never clarified that each distribution charge concerned a distinct act . . ." Notably,

Valentine ignores the court's earlier instruction listing the separate counts charged, and delineating that Valentine was charged with *two* counts of distribution. Moreover, the court specifically instructed the jury that "[y]ou must consider each charge separately and return a separate verdict for each charge."

This instruction was complemented by the State's argument that there were two separate controlled buys at issue in this case. The State reminded the jury of the details of the first buy that happened around noon on the day in question. The State then went over details of "the second transaction." The State also pointed to the analysis of the two separate drugs that were recovered after the buys. Further, the State explained that Valentine "had dominion and control over crack cocaine on two separate occasions before he exchanged it for cash to Sergeant Garcia."

Then, as if to corroborate the State's theory of the case, defense counsel conceded during closing argument that there were two separate acts during his closing argument when he agreed that "[t]here is no question that, (indiscernible) the evidence indicates, someone sold on two occasions cocaine to Sergeant Garcia."

We are persuaded that this record is not ambiguous. From start to finish, it was clear that Valentine made two separate and entirely distinct sales of crack cocaine to the undercover officer. The court's instructions and the arguments of counsel made clear to the jury that there were two instances of conduct, both of which Valentine could be found guilty only upon them being persuaded beyond a reasonable doubt. Finally, the jury's verdict form

clearly articulates the jury's findings with regard to each count so as to remove any ambiguity as to its findings. Accordingly, Valentine was properly sentenced for two separate convictions of distribution.

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